

TURNING FAMILY HOMES INTO CASTLES:
Testing the fortress of ‘dynastic’ trusts against relationship
property rights in New Zealand

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TABLE of CONTENTS

Introduction.....	1
I. An Overview of the Issues with Dynastic trusts and Relationship Property Rights.....	3
A. The Limited Concept of ‘Relationship Property Rights’ in New Zealand.....	3
B. The General Conflict Between Relationship Property and Discretionary Trusts.....	6
C. Clarifying the Dynastic Difference.....	9
D. The <i>Kidd v Van Den Brink</i> Example.....	11
E. Overview: the Issue of Dynastic Trusts Creating Castles Out of Family Homes.....	13
II. Current Law on Post-Relationship Access to Dynastic Trust Property in New Zealand.....	15
A. Property (Relationships) Act 1976.....	15
B. Section 182 Family Proceedings Act 1980.....	18
i) <i>Dynastic Trusts as ‘Nuptial Settlements’</i>	19
a) Ante nuptial settlements.....	20
b) Post nuptial settlements.....	21
c) Reasonable expectations of the parties.....	23
C. Other Proprietary Remedies against Trusts.....	25
i) <i>Establishing a Constructive Trust over Trust Assets</i>	25
ii) <i>Relationship Property Rights in a Constructive Trust Claim</i>	27
D. Common Law Approaches to the ‘Trust Problem’.....	29
i) <i>Challenges to the Trust Itself</i>	29
ii) <i>Bundle of Rights</i>	32
E. Conclusion.....	33
III. Overseas Approaches to Accessing Trust Property and the Role of the ‘Dynastic Argument’ in England and Australia.....	35
A. England.....	35
i) <i>The English Approach to Dividing Property Post-Relationship</i>	35
ii) <i>Accessing Trust Property under the Matrimonial Causes Act 1973</i>	36

a) S 24(1)(c): Nuptial Settlements.....	36
b) S 25: Likely financial resources.....	37
c) The relevance of the ‘dynastic’ argument.....	38
iii) <i>Summary: Ms Kidd’s Position Under English Law</i>	39
B. Australia.....	40
i) <i>The Australian Approach to Dividing Property Post-Relationship</i>	40
ii) <i>The Relevance of Trust Property under the Family Law Act 1975</i>	41
a) Discretionary trust assets as ‘property of the parties’ under s 79.....	41
b) ‘Property’ in the dynastic context.....	43
c) Discretionary interests as ‘financial resources’.....	44
d) S 85A: Nuptial Settlements.....	45
iii) <i>Summary: Ms Kidd’s position under Australian Law</i>	47
C. Conclusion.....	47
IV. The Conceptual Barrier Between ‘Relationship Property Rights’ and Dynastic Trust Assets.....	49
A. Re-Visiting the Limited Concept of ‘Relationship Property Rights’.....	49
iv) <i>The Necessary Proprietary Connection</i>	49
v) <i>The Relevance of a Dynastic Trust to a Relationship</i>	50
vi) <i>Limited Scope for Reform within the P(R)A Framework</i>	51
B. Re-Thinking Post-Relationship Obligations.....	53
Conclusion.....	55
Bibliography.....	56

Introduction

This paper addresses a unique aspect of the conflict between discretionary family trusts and relationship property rights in New Zealand. It focuses on the lack of relationship property rights a spouse or partner¹ has in a trust that has been settled by a third party to the relationship. In many family contexts in New Zealand this arises where property has been put into trust by parents to preserve it for future generations. This ‘dynastic’ trust property can easily become integral to a particular relationship without ever beneficially vesting in either partner, especially where it constitutes the family home or land that is contributed to throughout the relationship such as family farms. At the end of the relationship, no rights arise in relation to this property because it is not beneficially owned by either party to the relationship. Yet, the party who is connected to the property through their family ‘dynasty’ is likely to continue to enjoy the tangible benefits of the trust, which can create significant inequality between the parties in terms of the financial and economic impact separation has on either spouse.

The challenges a disadvantaged spouse meets at the interface between dynastic trust property and the end of his or her relationship are complex. It is clear that there are no ‘relationship property rights’ in assets held in dynastic trusts and that there never could have been, as long as neither party had beneficial ownership of the property that was relevant to their relationship. Unlike the situation where spouses settle their property on trust during their relationship, the connection between dynastic trust assets is more remote. This means it is more difficult, if at all possible, to justify creating a relationship property right in dynastic trust assets. However, with the increasing number of family trusts being used in New Zealand, it is relevant to give this issue consideration because the trusts that are settled between spouses this generation are likely to still hold the assets that become intertwined in the relationships of the next generation. The spouses of the next-generation beneficiaries could face a very difficult situation where the financial consequences of separation cannot be mitigated by clear property entitlements.

The ultimate aim of this paper is to test the strength of the protection that dynastic trusts provide over assets, such as family homes, from post-relationship claims. Fundamental to this

¹ The terms ‘spouse’ and ‘partner’ are used interchangeably in a general sense throughout this paper, except where it is made clear that a context only refers to one specific class of relationships.

is the system that creates relationship property rights in New Zealand under the Property (Relationships) Act 1976.

Chapter I will give a broad overview of the conflict between dynastic trusts and relationship property rights which will set the scene for considering whether a spousal claim to dynastic trust property can be substantiated within New Zealand's relationship property framework.

Chapter II assesses the current ways in which trust property could be vulnerable to a post-relationship claim and applies this to the dynastic context. It is clear that in the absence of 'relationship property rights' it will be very difficult for a spouse to succeed in acquiring any substantive provision from a dynastic trust.

Chapter III provides a comparative basis from both the English and Australian jurisdictions, where fundamentally different systems exist for determining post-relationship entitlements. This provides greater scope for considering interests in dynastic trusts in the redistribution of wealth between parties at the end of their relationship.

Finally, Chapter IV puts forward some conceptual challenges to establishing a 'relationship property' claim to dynastic assets. It will be argued that the relevance of dynastic trust assets to spouses at the end of their relationship cannot be conceived in terms of proprietary entitlements, which is what New Zealand's system is based on. Justifying the relevance of a dynastic trust in a post-relationship context can only be rationalised from a non-proprietary basis, such as spousal obligation to remedy relationship generated financial need, which would require a wide system change to address.

Overall I contend that there can be no relationship property rights in dynastic trust assets because such rights cannot be conceptually coherent with the kind of proprietary equality the Property (Relationships) Act is concerned with achieving. Accordingly, holding assets in dynastic trusts effectively turns family homes into castles by creating a conceptual impenetrability against any relationship based proprietary claim. For any greater remedy to exist for a disadvantaged spouse there would need to be a re-evaluation of the type of post-relationship equality that may be socially desirable to alleviate the level of need and economic disadvantage generated by broken relationships.

I. *An Overview of the Issues with Dynastic Trusts and Relationship Property Rights*

A. The Limited Concept of ‘Relationship Property Rights’ in New Zealand

Sharing property at the end of a relationship has become a significant consequence of living together as a couple in New Zealand.² This has developed over an evolutionary course of legal reform that has created relationship-based entitlements to property.³ Traditionally, such entitlements developed in response to the perceived injustice that an application of strict legal title would otherwise cause to a non-owning spouse in the post-relationship context. The expansion of relationship property rights has been influenced both by changing societal norms⁴ and by an increased acceptance that a relationship is a partnership of equals, which demands equal outcomes when the relationship ends.⁵ New Zealand couples now find themselves in a situation where, at the end of their relationship, expecting to share in the fruits of their partnership is reasonable. Underpinning this expectation is the current form of the Property (Relationships) Act 1976 (‘P(R)A’), which presumes significant relationships⁶ give rise to an equal entitlement to share in ‘relationship property.’⁷ This means that classification of an asset as ‘relationship property’ generally mandates equal division of that asset and accordingly requires a modification of the parties’ respective property rights to this effect.⁸ A clear rationale for this is that all forms of contribution to the partnership are

² This is the widest conception of relationships that are potentially caught by the operation of New Zealand’s relationship property regime. See Property (Relationships) Act 1976, s 2E subject to s 14AA.

³ *Family Law Service* (NZ) (looseleaf ed, LexisNexis, Wellington) at [7.301]. For a general overview of these reforms see Bill Atkin and Wendy Parker “Relationship Property in New Zealand” (2nd ed, LexisNexis, Wellington 2009) at 1-21.

⁴ This is evident in the extension of legislative jurisdiction to both de facto couples and same sex couples. See Atkin and Parker, above n 3, at 5-10.

⁵ Nicola Peart “The Property (Relationships) Amendment Act 2001: A Conceptual Change” (2008) 39 VUWLR 813 at 819. See also Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 3, which states that equality in partnership is a principle underpinning New Zealand family law that the law should endorse.

⁶ This includes marriages, civil unions and de facto relationships as defined in Property (Relationships) Act, ss 2A-2E, subject to the exceptions in s 14 where the relationship is of ‘short duration.’

⁷ Property (Relationships) Act, s 8 defines ‘relationship property’ to be the family home whenever acquired, family chattels whenever acquired, and, essentially, any property acquired by either party in contemplation of, or during, the relationship. See also Property (Relationships) Act, ss 9A and 10 discussed below at n 36-38.

⁸ Property (Relationships) Act, s 11 provides that spouses and partners are entitled to “share equally in the family home, family chattels and other relationship property.” This is subject to exceptions in s 13, if equal sharing of relationship property would be ‘repugnant to justice,’ and ss 14, 14A and 14AA, which apply when the relationship is of short duration.

recognised as being of equal value and the contributing parties are therefore equally entitled to the asset pool that collectively represents their joint enterprise.⁹

However, any ideal of achieving post-relationship equality between partners is inherently limited by the terms of the P(R)A itself. The P(R)A is a code for determining the division of a couple's property on dissolution of their relationship.¹⁰ By design, it only has powers to modify property rights in what it strictly defines as being property that is both beneficially owned by either party to the relationship and within the meaning of 'relationship property.'¹¹ The entire concept of relationship property in New Zealand is therefore a statutory construct and, beyond the terms of the P(R)A, relationship property rights per se do not exist. In a sense, this makes the P(R)A as much a regime for preserving separate property as it is for ensuring "equal contributions" are recognised and "just division" of relationship property is achieved.¹² The rights to any 'separate property'¹³ owned by either party when the relationship ends, are protected from any relationship-based variance.¹⁴ It is therefore possible, and legitimate under the P(R)A, that partners leave a relationship with disparate economic wealth.

Fundamental to the limited equality that the P(R)A promotes, is the ability for spouses to individually retain full ownership rights in assets during the relationship and therefore deal with their property in a way that is not constrained by the existence of their relationship.¹⁵ The deferred nature of relationship property rights creates a somewhat ironic system where rights only crystallise, generally, when the relationship is over.¹⁶ This makes it clear that the fact of a relationship does not itself create property rights in particular assets; rights against

⁹ Peart, above n 5.

¹⁰ Property (Relationships) Act, s 4.

¹¹ Property (Relationships) Act, ss 8 and 11. See also s 2, definition of 'owner' in relation to property as 'beneficial owner.'

¹² Property (Relationships) Act, s 1M (b) and (c).

¹³ Property (Relationships) Act, ss 9 and 10.

¹⁴ There is a limited ability to make orders against 'separate property' under ss 44C and 44F, where compensation can be ordered out of separate property if there has been a disposition of 'relationship property' to a trust or company defeating a spouse or partner's rights under the Act. Generally, however, protection for any property beneficially owned by either party at separation that is not 'relationship property' is implicit in the Act's codification, above n 10.

¹⁵ Property (Relationships) Act, s 19.

¹⁶ Property (Relationships) Act, s 20B provides an exception to deferred nature of relationship property rights by giving a protected interest in the family home to a non-owning spouse, against the owner's unsecured creditors. There is, however, no protection in the situation where neither spouse has beneficial ownership of the family home, such as if it is owned by a company or held in trust, but for a right to compensation out of relationship property as determined at separation in s 11B Property (Relationships) Act.

specific property only arise by virtue of obligations imposed by statute when the relationship ends.¹⁷ The deferred nature of rights under the P(R)A indicates that, at least in New Zealand, entitlement to an interest in property arising from a relationship reflects a limited obligation owed by partners to make restitution only for relationship contributions that they will unequally benefit from after the relationship ends. Inequality of continued benefit is manifestly limited to the retention of beneficially owned ‘relationship property,’ which is taken to be representative of relationship contributions.¹⁸ There are no compensatory rights for the mere fact that contributions have been made during the relationship; when there is no property to represent this relationship effort at the end, neither party will be benefiting from the enterprise more than the other.

For example, if a couple lived in a house purchased during their marriage but registered only in the husband’s name, on separation relationship property rights arise in the house, which is deemed to be a product of their joint contributions.¹⁹ If no relationship property rights arose, the husband would continue to have the benefit of owning the house but the wife would not have any equivalent value for her relationship efforts. But what if he had sold the house prior to separation and dissipated the proceeds, for example in a failed business venture? Regardless of the contributions expended by the wife during the relationship, her rights are limited to existing ‘relationship property’ at separation.²⁰ Despite the husband being able to unilaterally decrease the available relationship property existing at the end by selling the house during the relationship, the ultimate lack of property representing their shared enterprise means the husband will not continue to benefit from the relationship efforts by retaining ownership of the house any more than his wife will. Although it seems antithetical to the intention of equalising relationship contributions and treating both partners as equal,

¹⁷ RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (looseleaf ed. LexisNexis) at [1.2].

¹⁸ This is reinforced by recognising that the P(R)A only allows redress for any wider economic disparity that has been generated by the relationship, such as disparity in earning capacity caused by the division of functions during the relationship, out of property it classifies as ‘relationship property.’ See Property (Relationships) Act, s 15.

¹⁹ Property (Relationships) Act, s 8.

²⁰ Property (Relationships) Act, s 25. As noted, above n 16, there is a right to compensation out of relationship property for the absence of beneficial ownership in the family home but only to an equal share in other relationship property, which will now normally be a presumed entitlement under s 11 anyway. The compensatory power will also be fruitless if there is little ‘relationship property’ available which was acknowledged by the Court in *Schubert v Schubert* [2001] 1 NZLR 76 (HC) at [25] as being ‘unfortunate.’ That case was decided under the equivalent provision of the Matrimonial Property Act 1976 and involved an unsuccessful claim by the wife for compensation when the matrimonial home was owned by a company of which her husband was a shareholder. The Court made clear, at [25], that the limits of the available remedy indicate Parliament’s intention of what is to occur in the situation where neither party has beneficial ownership of the matrimonial home.

this outcome demonstrates that the real concern of the P(R)A is equalising the relative effect of contributions after the relationship ends, insofar as this corresponds to relationship property owned by the parties.

For these reasons it is clear that the concept of ‘relationship property rights’ is limited in New Zealand and the expectation of post-relationship equality with one’s spouse should be informed by this.

B. The General Conflict Between Relationship Property and Discretionary Trusts

This conception of relationship property rights relies on any disposition of property during a relationship resulting in a cessation of future benefit in that property, which does not require redress according to the P(R)A. Challenges to this arise when the disposition is to a discretionary trust from which de facto benefit can be enjoyed in the absence of beneficial ownership. The P(R)A presumes that at the end of their relationship a couple will beneficially own the fruits of their relationship but the prevalence of discretionary trusts as vehicles for holding family assets means this is not a reality for many New Zealanders.²¹

When property is held in a discretionary trust it is not equitably vested in any individual beneficiary unless or until the trustees exercise their discretion to allocate trust property to that beneficiary.²² This means that a person who holds a discretionary interest in trust has no proprietary rights in any of the assets subject to the trust.²³ Rather, a discretionary interest represents a mere hope of benefiting from the exercise of trustee discretion and the right to have this interest protected by due administration of the trust.²⁴ Issues with the use of these trusts have arisen particularly where a person without beneficial ownership of trust assets nonetheless has sufficient control over and enjoyment of the property to be considered

²¹ When the equal sharing of the P(R)A was introduced in 1976 this would have been the case, but for a number of reasons discretionary trusts have become increasingly used as a device for protecting property from personal liabilities. See Law Commission *Some Issues with the Law of Trusts in New Zealand: Review of the Law of Trusts Second Issues Paper* (NZLC PP20, 2010) at 10. See also Nicola Peart “Relationship Property and Trusts: Unfulfilled Expectations” (paper presented to New Zealand Law Society Relationship Property Intensive, August 2010) 1.

²² Robert Pearce, John Stevens and Warren Barr *The Law of Trusts and Equitable Obligations* (5th ed, Oxford University Press Inc, New York, 2010) at 457 and 545.

²³ *Nation v Nation* [2005] 3 NZLR 46 (CA) at [74]; *Hunt v Muollo* [2003] 2 NZLR 332 (CA) at [11]; *Johns v Johns* [2004] 3 NZLR 202 (CA) at [34]. The Supreme Court confirmed this view of discretionary interests in *Kain v Hutton* [2008] NZSC 61; [2008] 3 NZLR 589 at [25] and [33].

²⁴ *Gartside v Inland Revenue Commissioners* [1968] AC 553 (HL) at 617-618 per Lord Wilberforce.

tantamount to ownership.²⁵ In particular contexts where rights would arise for a third party in that property if beneficial ownership *was* vested in this ‘controlling’ party, it appears that the trust enables an avoidance of obligation.

Given the dramatic increase in the number of discretionary trusts over the last decade,²⁶ it is clear why the use of discretionary trusts for holding family property is perceived as becoming increasingly problematic for New Zealand’s relationship property law.²⁷ The objectives of the P(R)A fit into the category of being undermined by the benefit-without-burden paradox that discretionary interests seem to create. “Owner” is defined in the P(R)A as meaning “in respect of property ... a person who is the beneficial owner of the property.”²⁸ This qualifies the scope of “property”²⁹ that the P(R)A applies to and indicates why property in which either party has an interest less than beneficial ownership is not within the reach of the P(R)A. Assets that would, if in the beneficial ownership of either spouse, be divisible as relationship property are protected from such division based on the nature of either spouse’s limited interest in the property. This is despite the fact that trust property might represent relationship contributions and the retention of the benefits that can be conferred through a discretionary interest would, but for the trust, give rise to the obligation of equal sharing at the end of the relationship.

This conflict encourages the question of whether there should be a relationship property claim to assets that are not beneficially owned by either spouse and if so, when? Insofar as a trust undermines the objective of equal sharing that the P(R)A seeks to achieve, there is a case for arguing relationship rights should be protected and prioritised against the trust so the obligations that would otherwise be owed to a spouse at the end of the relationship are not

²⁵ Jessica Palmer “Controlling the Trust” (2011) 12 Otago LR 473 at 474.

²⁶ According to the latest available statistics, there were 253,800 tax returns filed by estates or trusts for 2010, which is an increase from the 145,900 filed for 2001: Inland Revenue “Returns filed 2002-2011” <www.ird.govt.nz/aboutir/external-stats/tax-returns/filed/> . Notably, this only reflects the number of trusts that generate income and are therefore registered for tax. There is an indefinite number of trusts existing that hold capital assets, which do not generate income, such as family homes.

²⁷ See Law Commission, above n 21. See also Nicola Peart, Mark Henaghan and Greg Kelly “Trusts and Relationship Property in New Zealand” 17 *Trusts & Trustees* 866 for a recent overview of the interaction between relationship property and trusts in New Zealand.

²⁸ Property (Relationships) Act, s 2.

²⁹ Property (Relationships) Act, s 2 defines ‘property’ to include “(a) real property; (b) personal property; (c) any estate or interest in any real property or personal property; (d) any debt or any thing in action; (e) any other right or interest.”

avoided.³⁰ This would be evident in a situation where, post-relationship, inequality in continued benefit from relationship efforts exists because of the trust. For example, a couple who have put their lifestyle block into trust, thereby divesting either of them of beneficial ownership might both be discretionary beneficiaries in relation to the property but on separation only one will continue to live there and realistically continue to benefit from it, while the other has to find somewhere to live with no substantial financial assistance guaranteed from the trust. There is a clear deprivation of entitlement to the ultimate fruits of the relationship which is fundamentally what the P(R)A is supposed to remedy.³¹

The question becomes more complex when the trust has been settled by a third party to the relationship. The deprivation of any P(R)A entitlement is not so clear in this situation. If a couple live in a family home that is owned by a trust settled by the wife's parents of which the wife is a discretionary beneficiary, a likely scenario in New Zealand when the house is attached to multi-generational farm land, neither will have beneficial ownership in the house to support any P(R)A rights. The consequences of relationship break down are the same as for the couple above; the husband will have to find somewhere else to live and the wife will most likely be able to continue to enjoy the lifestyle they had built up.³² However, unlike the situation where at least one of the spouses had beneficial ownership but chose to divest themselves of it, in this instance neither party ever had beneficial ownership in the asset. From the outset, no relationship property rights could accrue in relation to that property, regardless of any relationship contributions made to the property and each other.

This 'dynastic trust' situation is the crux of this paper and is a distinct aspect of the conflict between discretionary trusts and end-of-relationship claims to trust assets. The issue is whether assets held in these trusts could be, or should be, vulnerable to a spousal claim when trust property has been integrally involved in the claimant's relationship.

³⁰ This was essentially the premise underlying the Working Group Report's recommendation that amendment be made to the Matrimonial Property Act 1976 to provide power to access capital in discretionary trusts, although this recommendation has not been adopted. See Working Group Report, above n 5, at 13 and 14. See also Peart, Henaghan and Kelly, above n 27, at 871.

³¹ Property (Relationships) Act 1976, s 44C does provide power to compensate a spouse for dispositions to trust that defeat rights and would likely be operable in the above example. However, it only enables compensation to be made out of trust income as a last resort and gives not right to trust capital. This power will be discussed further in Chapter 2.

³² Admittedly, the nature of the wife's continued benefit would be subject to trustee discretion, but it is likely that in fact her lifestyle will remain the same, given the close family relationships generally involved in the administration of family trusts in New Zealand.

C. Clarifying the Dynastic Difference

Dynastic trusts, for the purposes of this dissertation, are discretionary family trusts settled by a third party to a relationship. The settlor is usually a parent of one of the spouses and the beneficiaries tend to be the children of the settlor, probably his or her grandchildren and perhaps nieces or nephews. The settlor's child, A, will obviously be a discretionary beneficiary and A's spouse may be a discretionary beneficiary during the marriage or relationship. As these interests will be discretionary they cannot themselves be touched by the P(R)A.³³ The trustees could include the settlor, or any other person. It is likely, as with many family trusts, that the settlor retains a power to remove and appoint trustees.³⁴ Immediately these kinds of trusts are distinguishable from spousal trusts, which are settled by one or both of the parties to the marriage. It will be easier to associate property that is subject to a spousal trust to a relationship and therefore lost relationship property entitlements, even though in both types of trusts neither party has beneficial ownership of any trust asset. The association of a couple to dynastic trust property will usually be through use and corresponding contributions, the core example being the family home owned by trust.

The label 'dynastic' relates not just to the technical ownership structure of the trust but also to the purpose for which the trust was settled. Property has been settled on trust for the benefit of a wide class of beneficiaries with the underlying intention of preserving assets for existing and future family members. In New Zealand especially, assets like family farms are the common subjects of trust with clear settlor intention to preserve the economic viability of such property, as well as ensuring retention of assets within the family continues. Settling family property on trust is an important consideration in succession planning and enables clear intentions for the passing on assets that are so economically and sentimentally valuable to generations to be protected. The desire to preserve family wealth is perfectly understandable and society as a whole benefits where the preservation of family wealth is economically beneficial to employment and production. This will be the case in many family operated businesses in New Zealand, especially for land based enterprise which generates significant economic activity.³⁵

³³ *Nation v Nation*, above n 23; *Kidd v Van Den Brink* HC Auckland CIV-2009-404-4694, 21 December 2009.

³⁴ Peart, Henaghan and Kelly, above n 27, at 867.

³⁵ New Zealand has long been economically driven by primary industries that are supported by multi-generational land bases. As recently as the June quarter 2012 the agriculture industry was the largest contributor to economic growth: Statistics New Zealand "Gross Domestic Product June 2012 Quarter"

Importantly, the external source of dynastic assets, being generally derived from parents or other family members but not from either party to the relationship, suggests that they are in a different category to what would generally be considered to constitute ‘fruits of the partnership.’³⁶ Section 10 P(R)A provides that property received voluntarily from a third party, such as through gift, inheritance or dispositions from trusts settled by a third party, will be separate property. This limits the kind of access a spouse would have to wider family assets that had passed into their spouse’s beneficial ownership, whether or not there was ever a trust involved. However, s 10 also provides that this property can become relationship property if it is used as the family home,³⁷ or chattels,³⁸ or has become so intermingled with relationship property it is unreasonable to treat it separately.³⁹ The other way in which s10 property could give rise to relationship property rights is under s 9A. Where increases in value of separate property that are attributable, whether wholly or in part, to the application of relationship property,⁴⁰ or the contributions of a spouse are directly or indirectly attributable to an increase in value of separate property,⁴¹ that increase is relationship property.⁴² However, these rights only arise once beneficial ownership has passed from the third party to a spouse.⁴³ So if a husband, B, had inherited land from his parents it would be separate property, but the contributions made by his wife to that property in the course of the relationship, insofar as they lead to an increase in value, could create relationship property rights in at least part of the land’s value.

It is also significant that resettlement of dynastic trust property onto another trust for the benefit of a smaller class of beneficiaries, such as a particular family unit, with the aim of providing protected inter-vivos inheritance, will prevent the accrual of relationship property

<www.stats.govt.nz/browse_for_stats/economic_indicators/GDP/GrossDomesticProduct_HOTJun12qtr.aspx>

³⁶ In its 1998 report on the Matrimonial Property Amendment Bill, the Government Administration Select Committee considered that assets that were not able to be classified as relationship property at any stage of the relationship were in a different category to the assets that were intended to be caught by the proposed amendments under ss 44A-44F. See Stephanie Ambler “Where There’s a Wrong There’s a Remedy – Or Is There With Trusts?” (2007) 5 NZFLJ 311.

³⁷ Property (Relationships) Act, ss 2 and 10(3).

³⁸ Property (Relationships) Act, ss 2 and 10(3).

³⁹ Property (Relationships) Act, s 10(2).

⁴⁰ Property (Relationships) Act, s 9A(1).

⁴¹ Property (Relationships) Act, s 9A(2).

⁴² Under s 9A(1) the entire increase is equally shared but under s 9A(2) a spouse is only entitled to share in the increase in proportion with his or the proportion of the increase that is attributable to his or her contribution, which contradicts the premise of equal sharing in the fruits of the relationship. For an overview and critique of the inconsistencies in s 9A see Margaret Briggs and Nicola Peart “Sharing the Increase in Value of Separate Property under the Property (Relationships) Act 1976: A Conceptual Conundrum” (2010) 24 NZULR 1.

⁴³ *Nation v Nation*, above n 23.

rights, because beneficial ownership will never have passed to the intended beneficiary. If instead of inheriting the land, it was put into a discretionary trust by B's parents for the benefit of B and any of his children alive at the date of vesting, and all the same contributions were made that could be connected to an increase in value, B's wife would have no rights to the property.⁴⁴ In this way the dynastic trust creates a strong kind of impenetrability over family assets by providing pre-emptive protection against their vulnerability to future spousal claims.

D. The *Kidd v Van Den Brink* Example

*Kidd v Van den Brink*⁴⁵ is a particularly useful example of the challenges spouses meet at the interface between their relationship and dynastic trust property and will be used throughout the rest of this paper as a reference point for considering the issues raised by Ms Kidd's situation. The case involved a formerly married couple, Nicola Kidd and Stephen Van Den Brink, and a trust settled by Mr Van den Brink's father. The Hilversum Family Trust No 2 was settled in January 1990 by Anthony Van den Brink for the final benefit of his five children. Discretionary beneficiaries included his children (the final beneficiaries), any child or remoter issue of final beneficiaries and any spouse of final beneficiaries.⁴⁶ The trustees had absolute discretion over dispositions of trust property and were permitted to apply both income and capital in exercising this discretion.

Ms Kidd began living together with Mr Van Den Brink as a couple in August 1998, occupying one of a number of houses on a large dairy farm owned by a family company, the shares of which were owned by the Hilversum trust. The couple married in early 2001, having a child, Lucas, in 2004. They separated in May 2006 and the marriage was dissolved in August 2008. Throughout the marriage the couple occupied this property and both enjoyed significant benefit from the trust. Ms Kidd asserted in the High Court that the trust had "provided her and her husband with a family home, paid out-goings, provided chattels such as cars and horse trucks and funded by way of a loan of \$500,000 the acquisition of a

⁴⁴ *Nation v Nation*, above n 23.

⁴⁵ *Kidd v Van Den Brink*, above n 33.

⁴⁶ The other discretionary interests included any wife or widow of the settlor, any trust formed for the benefit of any final or discretionary beneficiary, any company owned or substantially controlled by either final or discretionary beneficiaries, and any lawful charitable object. See *Kidd v Van den Brink* (HC), above n 33, at [5] and [6] for further details of the terms of the trust deed.

landscaping business”⁴⁷ The trust was effectively used as the over-arching structure for holding the assets of the wider Van Den Brink family and the consequences of all property relevant to this marriage being under this umbrella was that there was no available relationship property for Ms Kidd to access when the marriage was over. She was therefore faced with the challenge of finding an access route to property held in the trust in order to have any significant post-relationship resources to bridge the gap between her economic position during and after marriage.⁴⁸

Her initial claims under the P(R)A were struck out.⁴⁹ The only provisions in the P(R)A to access trust assets are under s 44 and s 44C which would have required that dispositions had been made to the trust either with intention to or with the effect of defeating Ms Kidd’s entitlement to share in the property disposed of under the P(R)A. The only clear property that went to the trust from the couple was \$650 per month deducted from her husband’s salary for living in the trust owned house, effectively under an informal lease.⁵⁰ This did not amount to a ‘disposition’ of property to trust for the purposes of ss 44 or 44C.⁵¹

The only other potential remedy was under s 182 Family Proceedings Act 1989 (FPA) which gives the court a discretionary power to vary the trust. Ms Kidd sought orders for trust capital to provide her with a suitable residence for herself and Lucas, separate provision for Lucas and any other order the court thought fit.⁵² However, to engage powers under s 182 the trust has to be a relevantly ‘ante or post nuptial settlement.’ The High Court view was that an ante nuptial settlement requires that the settlement be referable to a particular marriage.⁵³ A general intention to provide for future spouses of final beneficiaries at the time of settlement was insufficient to make the Hilversum trust an ‘ante nuptial settlement’ given that it was settled long before any relationship between Ms Kidd and Stephen Van den Brink existed and was intended to benefit the settlor’s children, rather than the parties of any particular marriage.

⁴⁷ *Kidd v Van Den Brink* (HC) 2009, above n 33, at [8].

⁴⁸ Ms Kidd was awarded an interim spousal maintenance order so did receive a limited degree of provision pending the outcome of the property dispute: *Kidd v Van den Brink* FAMC Papakura FAM-2006-055-435, 8 December 2008.

⁴⁹ *Kidd v van den Brink* (2008) 28 FRNZ 82 (HC).

⁵⁰ At [40].

⁵¹ At [43]-[45].

⁵² *Kidd v Van Den Brink* (HC) 2009, above n 33, at [10].

⁵³ At [32], following *Ward v Ward* [2009] NZSC 125; [2010] 2 NZLR 31.

Under the ‘post nuptial’ avenue for variation under s 182 it was argued for Ms Kidd that property subsequently settled on the trust during their particular marriage could amount to post-nuptial settlements, such as the \$650 per month payments or any other transaction that amounted to a settlement of property on the trust.⁵⁴ The High Court did not accept that any property subsequently settled on the trust during the marriage could constitute post nuptial settlements, although the Court of Appeal granted leave to appeal on this issue.⁵⁵ The parties reached a settlement before any resolution on this point was made in court.

Although the factual outcome of the dispute Ms Kidd faced might have seen her with some provision from the trust in settlement, her case demonstrates that a spouse who has lived in a situation where property integral to the marriage is owned by a dynastic family trust is facing an up-hill battle to establish any relationship based claim against the trust at the end of the relationship. There was no legal remedy available to Ms Kidd which meant she faced a significant transition of lifestyle, the loss of her home, and she gained nothing to support this transition from her relationship, although her husband would continue to live at the same standard.⁵⁶

The protection of the Hilversum trust over the assets that had been so intertwined with Ms Kidd’s relationship is consistent with the limited nature of relationship property rights discussed above. From another point of view it could be recognised that even if her husband had significant property outside the trust in his beneficial ownership she might have faced the same situation, if the property was ‘separate.’ The questions the case raises then, may be driven more by the inadequacies of the systems we have in place in New Zealand to remedy relationship generated economic disadvantage than any particular problem that exists with the use of dynastic trusts.

E. Overview: the Issue of Dynastic Trusts Creating Castles Out of Family Homes.

The strong protection the dynastic trust affords assets like family homes is going to be a real issue in future generations as beneficiaries to this generation’s trust trend, with the number of

⁵⁴In *Kidd v Van Den Brink* [2010] NZCA 169, at [15] the court assumed, for strike out purposes, that subsequent transactions would have been settlements.

⁵⁵ *Kidd v Van Den Brink*, above n 54.

⁵⁶ As an aside, the Van den Brink family were ranked in the 2012 National Business Review New Zealand Rich List at 122nd worth \$75million: The National Business Review “Rich List 2012” < <http://www.nbr.co.nz/rich-list-2012/99m-75m>>.

family discretionary trusts increasing.⁵⁷ The dynastic trust presents a number of interesting, and displeasing, answers for a spouse who may expect to have rights in trust property arising from his or her relationship efforts. The real issues it raises stem from the question of whether the lack of relationship property rights is a result of avoided obligations and if this is so, is the trust enabling avoidance? If not, there is an inherent vulnerability in the spouse who is left with nothing, having been supported throughout the relationship by trust property. This raises the issue of how this vulnerability should be protected, whether by informed choice to protect oneself or by rights to financial support?

⁵⁷ The repeal of gift duty may also further encourage the transfer of more assets to trust, with the added benefit of being able to do so free of any debt back that could be treated as property. See Taxation (Tax Administration and Remedial Matters) Act 2011, s 245; Law Commission, above n 21, at 14; Peart, Henaghan, Kelly, above n 27, at 867.

II. *Current Law on Post-Relationship Access to Dynastic Trust Property in New Zealand*

This chapter will provide an overview of the ways that the law in New Zealand currently restricts a spouse or partner from accessing property held in a dynastic trust at the end of their relationship. To clarify, I am talking about accessing assets that are, at the end of the relationship, held in a trust settled by a person outside the relationship in question. In considering the limited ways that trust property can be accessed by a disadvantaged spouse post-relationship, it becomes clear how strong the protection afforded to family assets by dynastic trust ownership really is.

A. **Property (Relationships) Act 1976**

The P(R)A does not define ‘property’ to include discretionary interests in trusts, which means that a spouse’s discretionary interest will not itself create an access route to trust property at the end of a relationship.⁵⁸ There are, however, some limited provisions in the P(R)A through which orders against trusts can be made. Orders in relation to trust property will be available where there has been an intentional disposition to defeat relationship property rights⁵⁹ or where a disposition to trust has had the effect of defeating relationship property rights.⁶⁰ Essentially this involves situations where, but for the trust, assets are identifiable as relationship property.

Section 44 P(R)A gives the court a wide power to make orders against third parties who have received property through a disposition that was intended to defeat rights under the Act. This could operate against a dynastic trust if, for example, a spouse disposed of an asset to a trust settled by his or her parent and the requisite intention existed, engaging the court’s power to reverse part or all of the disposition. Since the Supreme Court’s decision in *Regal Castings v Lightbody*,⁶¹ intention to defeat turns on the knowledge of the spouse or partner disposing of property to trust, at the time of disposition, of the risk that the disposition would prejudice the

⁵⁸ Property (Relationships) Act, s 2 defines property as including “real property; personal property; any estate or interest in any real or personal property; any debt or thing in action; any other right or interest”. Although the definition is non-exhaustive, the conventional view that discretionary beneficiaries have no legal or equitable interest in trust assets until trustees exercise their discretion in favour of that beneficiary, thereby excluding discretionary interests themselves from the PRA’s application, is well supported: *Nation v Nation* [2005] 3 NZLR 46 (CA) at [74]; *Hunt v Muollo* [2003] 2 NZLR 332 (CA) at [11]; *Johns v Johns* [2004] 3 NZLR 202 (CA) at [34].

⁵⁹ Property (Relationships) Act, s 44.

⁶⁰ Property (Relationships) Act, s 44C.

⁶¹ *Regal Castings v Lightbody* [2008] NZSC 87; [2009] 2 NZLR 433.

relationship property rights of the other spouse or partner.⁶² Although the threshold for intention seems to have loosened, it remains difficult to meet which reduces the general availability of s 44.⁶³ A further challenge in the dynastic context is the requirement that relationship property rights have been defeated by the disposition of property. This will not be the case where the relevant assets have never been beneficially owned by either spouse, as in Ms Kidd's situation where the core assets had been owned by the trust long before the relationship even commenced.⁶⁴

In situations where s 44 does not apply, an alternative power exists in s 44C where a disposition has had the effect of defeating relationship property rights. Section 44C is a compensatory provision aimed at restoring equal sharing to assets that have been disposed of, rather than counteracting the intentional avoidance of obligation that s 44 is focused on. It recognises that property put into a discretionary trust during a relationship will not always continue to benefit both spouses equally, in the way that it would have while their shared lifestyle continued. Compensation is required to remedy the inequality of continued benefit that one spouse receives through the trust, based on the parties' equal entitlement to share in the property if it weren't in trust.⁶⁵ Two of the key jurisdictional requirements that will make s44C inoperative in most cases concerning dynastic trusts are that the disposition must have been made by either or both spouses and it must be relationship property.⁶⁶ So dispositions made by a parent, or other third party, for the benefit of one or both spouses or partners, are not affected by any powers in the P(R)A.⁶⁷ The only way a s44C claim could realistically involve a dynastic trust is if either of the spouses, during the relationship, disposed of property to the dynastic trust and at separation the transfer constituted a defeat of one spouse's PRA claim to that property. This will be the case only if the property could have been classified as relationship property and the trust gave no value or stagnant value for the receipt of the assets.⁶⁸ For example, a husband might use income accrued during his marriage to contribute \$20,000 to the conversion of the family sheep farm to dairy, a costly enterprise that his parent's trust, which owns the farm, lacks the resources to fully fund. His income

⁶² *Ryan v Unkovich* [2010] 1 NZLR 434 (HC).

⁶³ The previous test for intention required proof of fraudulent motive: *Coles v Coles* [1987] 4 NZFLR 621.

⁶⁴ *Kidd v van den Brink* (2008) 28 FRNZ 82 (HC).

⁶⁵ See Department of Justice Report of the Working Group on Matrimonial Property and Family Protection (October 1988) at 13-14.

⁶⁶ *Nation v Nation*, above n 58, at [144].

⁶⁷ This situation will potentially be caught by s 182 Family Proceedings Act 1980, discussion of which is later in this chapter.

⁶⁸ *Ward v Ward* [2009] NZSC 125; [2010] 2 NZLR 31.

constitutes relationship property⁶⁹ and, assuming the husband received no debt back for his contribution to trust property, at separation his wife would have rights to compensation for the disposition.

However, the limitations of s 44C are numerous and even in situations where there has been a clear disposition of relationship property to a dynastic trust, which *does* have the effect of defeating rights under the P(R)A, any award is at the court's discretion and can only be met out of trust income, not capital assets.⁷⁰ It will not provide direct access to trust assets in a trust-busting kind of way and so does not afford supremacy to any rights a spouse might have had in the assets now in trust.⁷¹ The application of relationship property to the farm conversion in the above example will not give the wife, whose rights to the \$20,000 have been defeated, any claim to the farm or any increase in value that is attributable to it.⁷²

Overall, the powers under the P(R)A to access trust property provide limited access to dynastic trust property. Ms Kidd's case demonstrates the inability of existing P(R)A remedies to get into trust property that was never in the beneficial ownership of her husband or herself. It also shows that there is no entitlement under the P(R)A to be provided for by the trust in a compensatory manner without dispositions of 'relationship property' actually defeating a spouse's relationship property claim to that property. Fundamentally this outcome is in accord with the limited existence of 'relationship property rights' in New Zealand, as discussed in Chapter One. The P(R)A does not create any relationship property rights over property that has never been in the beneficial ownership of either spouse. Therefore, it provides no basis upon which a claim to trust assets that have been settled by someone else can rest.

⁶⁹ Property (Relationships) Act, s 8.

⁷⁰ Property (Relationships) Act, s 44C(2) provides for only three possible orders the court can make for the purpose of compensating a spouse or partner for their defeated rights: orders against the other spouse's relationship property entitlements; orders against the other spouse's separate property or, if the first two sources cannot provide adequate compensation, an order against trustees requiring them to apply all or part of income of the trust for a specified time or until compensation is fully paid.

⁷¹ Clearly, the inability to access trust capital can be fatal to compensation even where disposition has clearly defeated relationship property entitlements. See *Ward v Ward*, above n 68. This limitation is inherent in the orders available under s 44C and therefore applies to all discretionary trusts whether properly classified as a dynastic trust or a spousal trust.

⁷² Potentially this kind of contribution could give rise to the husband having a constructive trust claim against the trustees, depending on the reasonable expectations of the husband and the trustees in the circumstances under which they received the \$20,000. The potential access to trust assets via a constructive trust claim will be discussed further on in this chapter.

This outcome highlights the unique challenge dynastic trusts can create for disadvantaged spouses at the end of relationships, or will create in future generations, by keeping property outside relationships. Relationship property rights will not accrue over trust assets regardless of the use to which they are put or the connection between trust property and a particular relationship, if they remain outside the beneficial ownership of either spouse. This raises further concerns where trust property is contributed to by a couple through their relationship and may be measurably improved in value through joint efforts of the relationship.⁷³ The P(R)A makes no provision for this situation. The fact that one spouse will no longer benefit from contributions made to trust property once the relationship ends, is an issue that has to be addressed outside the P(R)A.

B. Section 182 Family Proceedings Act 1980

The only other statutory power to access trust property when a relationship ends exists in s 182 Family Proceedings Act 1980 ('FPA'). Section 182 is, however, only available upon dissolution of marriage or civil union so it is of no assistance for de facto couples or for immediate relief upon separation.

Section 182 provides that:

182 Court may make orders as to settled property, etc

- (1) On, or within a reasonable time after, the making of an order under Part 4 of this Act or a final decree under Part 2 or Part 4 of the Matrimonial Proceedings Act 1963, a Family Court *may inquire into the existence of* any agreement between the parties to the marriage or civil union for the payment of maintenance or relating to the property of the parties or either of them, or *any ante-nuptial or post-nuptial settlement made on the parties*, and *may make such orders* with reference to the application of the whole or any part of any property settled or the variation of the terms of any such agreement or settlement, either for the benefit of the children of the marriage or civil union or of the parties to the marriage or civil union or either of them, *as the Court thinks fit*. [Emphasis added]

A settlement in this context has a wide meaning, in line with the House of Lords interpretation of the equivalent English provision in *Brooks v Brooks*.⁷⁴ Essentially a settlement requires some form of on-going provision for the parties to a marriage (as opposed to an absolute or outright disposition of property such as a gift, which would not constitute a

⁷³ See for example *Q v Q* (2005) 24 FRNZ 232 (FC).

⁷⁴ *Brooks v Brooks* [1996] AC 375 (HL) which addressed the meaning of nuptial settlement under s 24(1)(c) Matrimonial Causes Act 1973. See *Kidd v Van Den Brink* [2010] NZCA 169 at [8].

settlement.)⁷⁵ A trust has been regarded as a ‘quintessential’ example of a settlement.⁷⁶ Section 182 can therefore be viewed as a very wide trust busting power that does not rely on intention to defeat relationship property entitlements,⁷⁷ or require any consistency with the P(R)A principles.⁷⁸ Rather, to engage the court’s discretion to make provision out of a trust by varying its terms, the trust in question must be relevantly ‘ante or post nuptial’ in character and have been ‘made on the parties’. The primary issue for a spouse against a dynastic trust is, therefore, the degree of proximity needed between the settlement of the trust and their marriage, so that it has the requisite ‘nuptial character’ to engage the Court’s discretion.⁷⁹

The Supreme Court in *Ward v Ward*⁸⁰ held that it is fundamental to the nuptial character of a particular settlement that it was made on the premise of the existence and continuation of a marriage.⁸¹ The power to vary these kinds of settlements in s 182 responds to the underlying premise of the settlement, enabling the court to remedy the consequences of that premise, the marriage, failing.⁸²

i) *Dynastic Trusts as ‘Nuptial Settlements’*

*Kidd v Van den Brink*⁸³ provides the most recent authority for assessing the operation of s 182 in relation to dynastic trusts. Following the *Ward* analysis, the High Court in *Kidd* considered that to possess a sufficiently nuptial character, a settlement needs to be made with

⁷⁵ *Brooks v Brooks*, above n, 74, at 392 per Lord Nicholls. In that case the House of Lords was concerned with the variation of a pension agreement but the provision in question, s 24(1)(C) is worded in the same way as s 182 and both provisions share the origins of s 37 Divorce and Matrimonial Causes Act 1867.

⁷⁶ *Ward v Ward*, above n 68 at [31].

⁷⁷ Anthony Grant and Nicola Peart “The Case for the Spouse or Partner” (Paper presented to New Zealand Law Society Trusts Conference, June 2009) 125, at 131.

⁷⁸ *Ward v Ward*, above n 68, at [14] per Tipping J; *Kidd v Van den Brink* HC Auckland CIV-2009-404-4694, 21 December 2009, at [36].

⁷⁹ *Kidd v Van den Brink* (HC), above n 78, at [18].

⁸⁰ *Ward v Ward*, above n 76, is the leading authority in New Zealand on the scope and purpose of s 182 and provides an important indication as to the limits on s 182’s operation. The facts of the case, in brief, involved a family farm owned by a company which Mr and Mrs Ward were the sole shareholders of, by virtue of an agreement entered into between them during their marriage. At the same time Mr and Mrs Ward both gifted their shares to a trust, which they settled for the benefit of themselves and their children. This constituted a disposition of relationship property, as most of the shares had been acquired by Mr Ward during the marriage. However, s 44C P(R)A offered no recovery because there was insufficient income from the trust assets to compensate Mrs Ward for the loss. Mrs Ward successfully engaged s 182 on the basis that the trust constituted a post nuptial settlement. As the case went all the way to the Supreme Court, it involves a thorough analysis of when s 182 can be invoked and what it is supposed to achieve, which is useful in considering its potential application to a settlement that is a dynastic trust.

⁸¹ *Ward v Ward*, above n 76, at [15].

⁸² At [15].

⁸³ *Kidd v Van Den Brink* (HC), above n 78; *Kidd v Van Den Brink* [2010] NZCA 169.

reference to a particular marriage rather than simply the wider state of marriage.⁸⁴ The settlement must be premised on the existence and continuation of that particular marriage and the parties to the marriage must be the primary beneficiaries of the qualifying settlement, being a settlement “made on the parties”.⁸⁵

a) Ante nuptial settlements

This reasoning indicates the difficulty in classifying dynastic trusts that have been settled prior to a marriage, for a wide range of beneficial interests, as ante nuptial settlements.⁸⁶ It is not enough that a trust is settled prior to the marriage on terms that enabled a claimant to be one of a range of discretionary objects, through marriage to a final beneficiary. The High Court in *Kidd* considered that “the settlement of property on trustees with a wide power to apply all capital and income among an indeterminate number of beneficiaries is conceptually different” to a settlement that is premised on a particular marriage.⁸⁷ The Hilversum Trust could not properly constitute an ante-nuptial settlement seeing as it was settled for the purpose of benefiting a number of classes of interests, long before the particular marriage of Nicola Kidd and Stephen Van den Brink was ever contemplated.⁸⁸ It was not premised on the continuation of this particular marriage; its purpose was to provide for a wide range of individuals and at most the settlement contemplated the possibility of a marriage but this was incidental to the primary objects.⁸⁹

While a dynastic trust, settled by a third party, could be a ‘classic ante nuptial settlement’⁹⁰ if for the benefit of a particular marriage, in most cases dynastic trusts will be settled for the benefit of many family members and will often have preceded a particular marriage coming into existence like the trust in *Kidd*.⁹¹ It will clearly be difficult to meet the jurisdiction of ‘ante nuptial’ settlement in these cases.⁹²

⁸⁴ *Kidd v Van Den Brink* (HC), above n 78 at [20]; *Kidd v Van Den Brink* (CA), above n 83, at [10].

⁸⁵ *Kidd v Van Den Brink* (HC), above n 78, at [28].

⁸⁶ At [29].

⁸⁷ *Kidd v Van Den Brink* (HC), above n 78, at [29].

⁸⁸ At [31]-[34].

⁸⁹ At [34].

⁹⁰ *Ward v Ward*, above n 68, at [14]. See for example *Chrystall v Chrystall* [1993] NZFLR 772 (FC).

⁹¹ This will certainly be the case for many spousal trusts that have been settled in the trust trend of this generation, which include children as beneficiaries. When these beneficiaries begin to use trust assets in their own relationships, their spouses and partners may face a situation like Ms Kidd.

⁹² In *Kidd v Van Den Brink* (HC), above n 78, at [29], the Court did not rule it out, but said that it was difficult to conceive of a qualifying settlement which included among its objects a number of family units.

b) Post nuptial settlements

When a trust is settled after a marriage has been entered into, for the benefit of the couple and their children, it will be easier to meet the test of necessary connection between the settlement and the particular marriage to classify the trust as a post-nuptial settlement.⁹³ A more difficult question arises when, during a marriage, property is settled on a trust that was created prior to and without reference to that particular marriage, as many dynastic trusts will be.

In *Kidd v Van den Brink*⁹⁴ the Court of Appeal granted leave to appeal on the issue of whether dispositions of property to trust during the marriage could each constitute post-nuptial settlements. The argument to support this recognises that each disposition of property to a trust is a new settlement of that property on the trustees which impresses that property with a trust obligation, albeit on the same terms as previous settlements.⁹⁵ The High Court held that because the Hilversum trust lacked a sufficiently nuptial character at the time of settlement, the subsequent acquisition of assets could not attract the necessary nuptial characteristic to be post nuptial settlements.⁹⁶ However, a proper conception of the trust relationship recognises that every time an asset is settled on trustees new obligations are created over that property in relation to beneficiaries, which constitutes a new settlement.⁹⁷ The Court of Appeal has recognised this by seeing the arguable point in subsequent settlements of property on a trust possibly having a nuptial character. If a transaction through which a trust has acquired property during a particular marriage constitutes a settlement, the need for inquiry into the nuptial character of that settlement remains.⁹⁸ It will depend on the evidence available in a particular case, but it is at least arguable that such settlements could be relevantly made by reference to the particular marriage, as required by the English cases

⁹³ *Kidd v Van Den Brink* (CA), above n 83, at [6].

⁹⁴ *Kidd v Van Den Brink* (CA), above n 83.

⁹⁵ This was based on Kiefel J's view in the Australian case *Kennon v Spy* [2008] HCA 56; (2008) 251 ALR 257 at [229] that each disposition of property to trust can be treated as a distinct settlement. This case will be discussed in greater detail in Chapter Three.

⁹⁶ This relied on a discussion in the Court of Appeal decision of *Ward* that assets subsequently settled on a trust that was "ante or post nuptial" were themselves subject to s 182. See *Ward v Ward* (CA), above n 76, [32]-[36]; *Kidd v Van Den Brink* (CA), above n 83, at [12].

⁹⁷ This conception of the multi-trust theory is evident in the context of sham cases which suggest particular dispositions create distinct trust relationships. See *Official Assignee v Wilson & Clyma* [2008] 3 NZLR 45 (CA), at [57]. See also *Grupo Torras S.A. and Culmer v Al.Sabah and four others (In Re Esteem Settlement)* [2003] JLR 188 at [60], which is referred to in Jessica Palmer "Dealing with the Emerging Popularity of Sham Trusts" [2007] NZ L Rev 81 regarding the possibility for 'partial' shams in relation to particular trust assets.

⁹⁸ *Kidd v Van Den Brink* (CA), above n 83, at [14].

accepted in the *Ward* approach.⁹⁹ For example, if Anthony Van den Brink had purchased the couple's family home, for them to live in during their marriage, and transferred the house to the Hilversum trust it might qualify as a post nuptial settlement, giving the court jurisdiction to alter the interests in the house.¹⁰⁰

Although the issue remains open, as the *Kidd* litigation appears to have settled privately, the Court of Appeal's willingness to hear the issue does indicate a potentially wider use of s 182 in the dynastic context. Clearly, the establishment of a trust prior to marriage, without reference to a particular marriage, will not always be determinative of the status of subsequent settlements of property on the trust which do occur during the existence of a particular marriage. However, accepting that the nuptial character of a settlement depends on it being referable to a particular marriage suggests that every new settlement of property on the trust would itself need to be referable to the particular marriage.¹⁰¹ When the trust has a wide number of discretionary interests, as in the Hilversum Trust, it is likely to remain difficult to prove a sufficient connection between the acquisition of property by the trust and a particular marriage. The nature of the couple's interests in the settlement is discretionary and cannot be quantified easily in relation to a number of other discretionary interests in the trust property.¹⁰² There would need to be clear evidence that a particular settlement of an asset on the trust was for the benefit of the particular marriage and not for the wider range of discretionary interests.

There is currently no precedent for what evidence could establish nuptial character in this context, and the only real support comes from Kiefel J's comments in the Australian case of *Kennon v Spry*.¹⁰³ She held that if a settlement is made for the benefit of parties outside the marriage as well it wouldn't be fatal to the nuptial element of that settlement.¹⁰⁴ Arguably, the application of Kiefel J's views to s 182 is limited by her broader conception of 'nuptial'

⁹⁹ At [15].

¹⁰⁰ Nicola Peart "Relationship Property and Trusts: Unfulfilled Expectations" (paper presented to New Zealand Law Society Relationship Property Intensive Conference, August 2010) 1, at 21.

¹⁰¹ See *Kidd v Van Den Brink* (CA), above n 83, at [16] where the Court of Appeal makes clear that all settlements need to be made in reference to a particular marriage. The Court also noted, at [10] that only the Supreme Court could change the *Ward v Ward*, above n 76, interpretation of nuptial settlement requiring reference to a particular marriage.

¹⁰² The Court of Appeal noted the existence of wider interests in the Hilversum trust could be a 'possible difficulty' in advancing the argument that there were post nuptial settlements on the trust: *Kidd v Van Den Brink* (CA), above n 83, at [17].

¹⁰³ *Kennon v Spry*, above n 95.

¹⁰⁴ See *Kennon v Spry*, above n 95 per Heydon J at [186].

character being established through association of the marriage to the settled property rather than arising from the purpose of settlement.¹⁰⁵ In any case, this potential window to access trust property is narrow, relating only to particular assets and not to all trust property, and only extends to what the court considers to be a claimant's reasonable entitlement to that property.

c) Reasonable Expectations of the Parties.

Even if a trust meets the 'nuptial' threshold, which will be difficult when the trust is dynastic, the extent of a claimant's interest in any trust property depends on the 'reasonable expectations' of the parties.¹⁰⁶ There is no overarching principle of equal sharing to determine the post-relationship entitlements of a claimant spouse to a nuptial settlement. Outcomes under s 182 will therefore be very fact specific. It is clear that providing for a disadvantaged spouse based on a concept of just division or with the aim of remedying a lack of relationship property rights, is not within the scope of s 182.¹⁰⁷

This is evident when considering the variance in entitlements that are conferred under s 182's 'reasonable expectations' test and those which would be created by having relationship property rights under the P(R)A. As a recent example, in *LSP v WSP*¹⁰⁸ the couple had, throughout their 12 year marriage, lived and worked on a farm that at separation was held in the WG Trust which had been settled by the husband, W, during the marriage. The WG Trust was a post-nuptial settlement¹⁰⁹ and under s 182 the court ordered the trustees of the WG Trust to make a capital advancement of \$200,000 to W's wife L.¹¹⁰ This was the court's quantification of L's 'reasonable expectations' relating to the WG Trust, having found that L had a reasonable expectation to be provided for by the trust. It was much less than a half share in the trust property.

The farm property had belonged to W's father, and prior to the settlement of the WG Trust it was held on a testamentary trust (TSP Trust) for the benefit of the testator's wife (W's

¹⁰⁵ Chapter Three provides greater analysis of the distinctions between s 182 FPA and Australia's equivalent provision Family Law Act 1975 (Cth), s 85A, particularly the variance in interpretation offered by Heydon and Kiefel JJ respectively in *Kennon v Spry*, above n 95.

¹⁰⁶ *Ward v Ward*, above n 76, at [25].

¹⁰⁷ *Ward v Ward*, above n 76, at [49]; *Kidd v Van Den Brink* (HC), above n 78, at [36].

¹⁰⁸ *LSP v WSP* FC Gore FAM-2007-017-124, 30 May 2011. See also *DAM v PRM* FC Masterton FAM 2008-035-512, 30 March 2011.

¹⁰⁹ *LSP v WSP*, above n 108, at [1].

¹¹⁰ At [109] and [110].

mother) and children (W and brother K) when he died. The obvious intention of W's father was to preserve the farm so it could ultimately be passed on to the next generation and to effect this it was arranged that a trust settled by W (WG Trust) would purchase the farm property, with a debt back owed to the TSP trustees.¹¹¹ The TSP trustees then appointed the debt to W, which effectively crystallised the value of W's 'inheritance' at the value of the debt at \$435,000 owed to W by the WG Trustees.¹¹² When W and L separated neither spouse had beneficial ownership of any of the capital assets held in the WG Trust so there were no relationship property rights in the farm, its plant, the homestead or any other property relating to the couple's life on the farm. As inheritance, the debt owed to W by the WG Trustee was his separate property.¹¹³ However, if instead of the debt W had inherited and retained the beneficial ownership of the farm, L would have had relationship property rights to the homestead, as family home,¹¹⁴ and more significantly a share in the increase in value of the property that could be attributed to her contributions to the relationship.¹¹⁵ The increase in value between the time of WGT purchase and the date of hearing was between \$900,000 and \$1.1 million.¹¹⁶ Potentially this could have given W's wife L an entitlement up to \$550,000, as opposed to the \$200,000 she received under s 182.¹¹⁷ The disparity in outcome reflects the fundamentally distinct objectives of s 182 and the P(R)A. In practice there was no change in the treatment of the property or the contributions made by L during her marriage by the fact that the farm was held in trust but the fact that it was in trust significantly altered her entitlements at the end of the marriage.

The reasonable expectations test ties into the requisite 'nuptial' character of the settlement to justify variation being made out of trust property only insofar as those expectations can be restored. The nuptial element of a settlement is effectively controlled by the settlor's intention and it would be easy to ensure that a dynastic trust was not vulnerable at all to potential variation by excluding reference to any spousal interests, future or otherwise. This means that the third possibility, and worse situation, for spouses such as LSP is that if the trust is not a 'nuptial settlement' any reasonable expectations of provision will be fruitless. If the TSP

¹¹¹ At [9] and [22].

¹¹² At [42].

¹¹³ Property (Relationships) Act, s 10; *LSP v WSP*, above n 108, at [23].

¹¹⁴ Property (Relationships) Act, s 10(4).

¹¹⁵ Property (Relationships) Act, s 9A(2).

¹¹⁶ See *LSP v WSP*, above n 108, at [98] for the relevant values to calculate this.

¹¹⁷ It is important to recognise that this is only a share in the increase in value, so the full capital value of the farm and trust property from which the beneficiaries of the WG Trust, that is, W, will benefit from is more than this.

trustees had retained the farm that W and L lived and worked on, as had been the case for the first few years of their relationship, there would have been no post-nuptial settlement. Like Ms Kidd, L would have had no entitlement to any capital provision despite facing the same financial and economic consequences of separation that she would have faced, whether the farm been owned beneficially by W, or was the subject of a nuptial settlement or of the TSP Trust.

C. Other Proprietary Remedies against Trusts

i) *Establishing a Constructive Trust over Trust Assets*

With the generally limited use of existing statutory provisions to access trust assets at the end of a relationship, there is a distinct lacuna in the law for recognising the contributions of a spouse to trust property. Traditionally, the gap created by contributions to property through a relationship and a lack of ‘relationship property rights’ has been filled with proprietary remedies through constructive trusts over the assets that have been contributed to.¹¹⁸ However, the situation for spouses who have contributed to property held in trust creates a different issue because the lack of ‘relationship property rights’ is based on the property being owned outside the relationship, rather than a lack of statutory rights to access property owned by the other spouse. Any equitable claim to trust assets would have to be made out against trustees as owners of the property. This will be more difficult to establish than where a claim can be made against the other spouse, as the types of contributions that will engage the conscience of trustees, thereby providing the requisite juridical basis for imposing a constructive trust,¹¹⁹ are going to be much more limited.

A constructive trust arises where a person makes direct or indirect contributions to property in circumstances where there is a reasonable expectation of acquiring an interest the property contributed to.¹²⁰ In *Lankow v Rose*¹²¹ Tipping J deduced more clearly four requirements to

¹¹⁸ Prior to the Property (Relationships) Amendment Act 2001, partners of de facto relationships faced the situation of having no relationship property rights to property that wasn’t jointly owned between them. The constructive trust remedy developed in response to this in a series of Court of Appeal cases: *Gillies v Keogh* [1989] 2 NZLR 327 (CA); *Phillips v Phillips* [1993] 3 NZLR 159 (CA); *Lankow v Rose* [1995] 1 NZLR 277 (CA). For an overview of this development see Mark Henaghan and Nicola Peart “Relationship Property Appeals in the New Zealand Court of Appeal 1958-2008: The Elusiveness of Equality” in R Bigwood (ed) *The Permanent New Zealand Court of Appeal: Essays on the First 50 Years* (Hart Publishing, Oxford, 2009) 129.

¹¹⁹ *Fortex Group Ltd (in receivership and liquidation) v MacIntosh, Cox & Forde* [1998] 3 NZLR 171 (CA).

¹²⁰ *Lankow v Rose*, above n 118.

¹²¹ *Lankow v Rose*, above n 118.

establish a constructive trust against property at the end of a relationship. The claimant must show:¹²²

- i) Contributions, direct or indirect, to the property in question.
- ii) The expectation of an interest therein.
- iii) That such an expectation is a reasonable one.
- iv) That the defendant should reasonably act to yield the claimant an interest.

If a claimant spouse can show all of these elements then Equity will regard it as unconscionable for the defendant not to yield an interest.¹²³ Contributions¹²⁴ must be causally connected to the “acquisition, enhancement or preservation” of the defendant’s property so that a proprietary interest in particular assets is justified.¹²⁵ This also requires that the contributions outweigh any benefits received.¹²⁶

Although there is no reason in principle to prevent a successful constructive trust claim over trust assets, the *Lankow* test will only be met in situations where the trustees, as legal owners of the property, have a reasonable expectation of yielding an interest to the claimant.¹²⁷ Trustees, especially of dynastic trusts, are likely to be remote from the relationship in question, making it more difficult for there to be a mutually reasonable expectation that the claimant will have an interest in the relevant trust property.¹²⁸ There may be instances where a spouse has made direct financial contribution that has clearly increased the value of trust assets that could make it unreasonable for the trustees not to yield an interest. However, even where clear contributions have been made to trust assets by a spouse who expects an interest in the property, there may be no reason why the trustees would expect to yield any interest other than in accordance with the terms of trust.¹²⁹

¹²² *Lankow v Rose*, above n 118, at 294 per Tipping J.

¹²³ *Lankow v Rose*, above n 118, at 294 per Tipping J.

¹²⁴ See *Lankow v Rose*, above n 118, at 295 per Tipping J where he considered that ‘payment or services’ provided in the course of a relationship that have helped the other person to ‘acquire, improve or maintain’ the value of their property could suffice as a contribution. In *Nash v Nash* [1994] NZFLR 921 the provision of household services was sufficient to constitute contributions and give an interest over whole lifestyle block.

¹²⁵ *Lankow and Rose*, above n 118, at 282 per Hardie Boys J.

¹²⁶ *Lankow and Rose*, above n 118, at 282 per Hardie Boys J.

¹²⁷ *Prime v Hardie* [2003] NZFLR 481 (HC); *Glass v Hughey* [2003] NZFLR 865 (HC). Both of these cases allowed a successful constructive trust claim against a trust but did so because the trusts were held to be the alter ego of the claimant’s spouse. The scope of the alter ego argument has been reduced to providing evidence of sham intention after *Official Assignee v Wilson & Clyma*, above n 97.

¹²⁸ *Boys v Calderwood* HC Auckland CIV 2004-404-290, 14 June 2005.

¹²⁹ *Miller v Stewart* [2000] NZFLR 433 at [87].

A number of difficulties seem to face a claimant who has contributed to trust property under a premise of continuing to benefit from that property, which is what occurs while their relationship exists. The property in question, such as the family home or land that has been worked on during the relationship, may have in fact been treated in a particular way by the family and even the settlor, who will probably be closely related to the claimant's spouse or partner, that gives rise to expectations that these contributions will ultimately result in an interest in the property. This will not necessarily justify a constructive trust against the property in the hands of trustees. In *Endres v Glendinning*,¹³⁰ for example, a couple lived on a block of land held in a trust that was settled by the wife's father for her final benefit and the benefit of any children she may have at the date of vesting.¹³¹ Over the course of their 22 year marriage the husband provided a wide range of contributions to the property, including repairs and maintenance of fencing and gates, home decorations, and to the development of a nursery business that his wife began from the land during their marriage.¹³² Although these contributions were of ultimately negligible value,¹³³ the husband claimed that his wife and his father in law, the settlor, had led him to believe he would have an interest in the property based on his efforts throughout the marriage. However, this was insufficient to establish any claim he could have against the trustees, the court noting that "a partner who elects to live on trust property under a family trust must enquire as to the trust terms and determine his or her own living and investment priorities to suit".¹³⁴

It will be even more difficult when a spouse has merely contributed to his or her relationship through the provision of domestic support, payment of living expenses and other efforts indirectly connected to the assets in question to prove a sufficient connection to property when it is owned by trustees.¹³⁵ These kinds of contributions cannot be used to establish some kind of equitable claim against the other spouse either; there is no equitable basis for substitution or equalisation of efforts through the relationship to assets that either party *can* access.¹³⁶

¹³⁰ *Endres v Glendinning* HC Palmerston North CIV-2003-454-189, 25 November 2003.

¹³¹ At [2].

¹³² *Endres v Glendinning*, above n 130, at [12].

¹³³ At [13].

¹³⁴ At [24].

¹³⁵ *Millar v Stewart*, above n 129.

¹³⁶ *Nuthall v Heslop* [1995] NZFLR 755 (CA). In this case Tipping J clarified that his judgment in *Lankow v Rose* requires that contributions are made to the defendant's assets. In that case, the family home was owned by a company in which the de facto husband had preferential shares and effective control. The de facto wife tried to

The potential availability of other equitable claims will be limited by the same considerations. In *Gillies v Keogh* Cooke J, as he then was, considered that whatever the label, reasonable expectations in light of the conduct of the parties is at the heart of the matter.¹³⁷ In some cases a claim in unjust enrichment or estoppel might succeed but there needs to be a reasonable basis for doing so.¹³⁸

ii) *Relationship property rights in a constructive trust claim*

Another possible avenue of access to consider is where a constructive trust claim *could* be made out by either party to a relationship, it would represent a chose in action that accrued during the relationship which is ‘relationship property’ under the P(R)A and therefore able to be equally divided.¹³⁹

However, as with all other equitable claims, the availability of such a remedy is fact dependent and although it may provide relief for some cases it is still limited to situations where the trustees are reasonably expected to yield an interest. Circumstances where this might arise could be if one spouse works for the trust at a salary below market value or provides direct contributions to increase the value of trust property without remuneration.¹⁴⁰ There would also need to be clear evidence of the contributor having an expectation beyond the rights conferred by the trust instrument. It is appropriate that, where this type of claim could succeed, the outcome recognises the joint efforts of the relationship and shared expectations that arise through equal contributions to a relationship are able to be accounted for. As a relationship property right, the claimant will generally have an equal half share the extent of the interest held in constructive trust.

claim a proprietary right over his other assets based on her contributions to the house and living together and was unsuccessful.

¹³⁷ *Gillies v Keogh*, above n 118.

¹³⁸ See *Endres v Glendinning*, above n 130, at [20]-[23] where the remoteness between claimant spouse and trustees was fatal to all other claims such as in proprietary estoppel or restitution for quantum meruit for the services provided.

¹³⁹ Property (Relationships) Act, s 2, defines ‘property’ to include ‘anything in action.’ In *Nation v Nation*, above n 58, at [75] the Court of Appeal mentioned in obiter the possibility of a constructive trust claim existing against the family trust in relation to the increase in value over the portion of land that the husband and wife anticipated the husband would ultimately receive and the valuable contributions made during their marriage to the farm, as trust property under this premise. This use of constructive trust was accepted in principle in *Q v Q*, above n 73, at [164]. See also Jane Hunter “Lankow v Rose in the 21st Century” (2010) 6 NZFLJ 283.

¹⁴⁰ For example *Nation v Nation*, above n 58, where the valuable improvements made by the couple to trust property were not remunerated based on the expectation the husband would ultimately receive the trust’s half interest in the farm.

D. Common Law Approaches to the ‘Trust Problem’

The common law has responded to the effect of discretionary trusts defeating rights and undermining P(R)A objectives in a number of ways that could provide potential relief to a spouse against trust property. However, these will also be of little use for a spouse claiming dynastic trust property.

i) *Challenges to the Trust Itself*

In some cases spouses have argued that a trust which holds relationship property is a sham based on the other spouse’s significant control over the trust’s administration and assets. A finding of sham enables the Court to look behind the trust documentation despite the objective appearance of validity. However after *Official Assignee v Wilson and Clyma*,¹⁴¹ the test for sham is set at a high threshold, requiring common intention between the settlor and trustees, at the time of creating the trust, that it would be a façade and the trust documents which otherwise evidence a valid trust were never intended to take effect according to their terms. The Court of Appeal also made clear that arguments of the trust being used as a spouse’s alter ego, based on the degree of control exercised by that spouse, is only evidence of an intention to deceive that may go to prove sham intent but does not provide access to trust assets per se.¹⁴²

The use of sham arguments will be limited for spouses, who will generally have set up their trust without intention to deceive. This is even more so for a spouse who is claiming a dynastic trust is a sham, as these trusts will generally have been settled with the legitimate purpose of operating as a trust to preserve property for its beneficiaries. Even if a sham argument succeeded against a dynastic trust, a bigger hurdle exists for the claimant spouse to prove any relationship property entitlement in the assets held in the sham dynastic trust. Generally, upon finding that a trust is a sham, the assets are considered to be held on resulting trust for the settlor,¹⁴³ which means the property will continue to be outside the relationship in question and there will be no relationship property rights in any of the assets.

¹⁴¹ *Official Assignee v Wilson & Clyma*, above n 97.

¹⁴² At [70] and [71] per Robertson and O’Reagan JJ; at [128] and [129] per Glazebrook J.

¹⁴³ At [118] per Glazebrook J. See also Jessica Palmer “Sham Trusts” in A Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 393, at 403.

Other attempts to invalidate the trust structure have developed outside the sham doctrine, reflecting judicial frustration with inherent statutory constraints on accessing trust property when rights are being defeated by discretionary trusts.¹⁴⁴ In *Harrison v Harrison*¹⁴⁵ Fogarty J concluded that property which had been settled on trust by spouses during their marriage, for the benefit of themselves and their children, was still owned by them because the level of control they retained over the property prevented the separation of legal and equitable estate. Despite their valid intention to create the trust, Fogarty J considered this control existed because the husband and wife retained the power to appoint and remove trustees thereby deeming them to control trustee discretion.¹⁴⁶ However, the inherent flaw in this argument is that it assumes the trustee¹⁴⁷ was not subject to any duties owed to the children as beneficiaries.¹⁴⁸ In setting up the trust with genuine intention the couple conferred rights on the beneficiaries to hold the trustee to account in relation to the property. These rights, and therefore the structure of the trust, cannot simply be ignored, which was indicated by the Court of Appeal in granting leave to appeal the decision.¹⁴⁹

The scope for this kind of argument will be very limited in the dynastic context as the trust will usually have been set up with genuine intention that creates rights for a range of other interests. What is more problematic for a claimant spouse who *could* establish that a dynastic trust was invalidly settled, is that the consequences of invalidity would mean the assets revert to the settlor's ownership, which is outside the relationship in question. There is no obvious bridge between an argument that invalidates a dynastic trust and a finding of relationship property rights for a spouse such as Ms Kidd. When the trust is taken out of the picture, beneficial ownership is still required to vest in one of the spouses in the relevant relationship for there to be any relationship property rights in the assets that have been subject to the 'invalid' trust. There is no basis for assuming that anyone except the settlor would have beneficial ownership of the assets settled on the 'invalid' trust.

¹⁴⁴ See Law Commission *Some Issues with the Law of Trusts in New Zealand: Review of the Law of Trusts Second Issues Paper* (NZLC PP20, 2010), at [443].

¹⁴⁵ *Harrison v Harrison* (2008) 27 FRNZ 202 (HC).

¹⁴⁶ At [25].

¹⁴⁷ The trustee was a company that the couple were the sole directors and shareholders of: *Harrison v Harrison*, above n 145, at [3] and [25].

¹⁴⁸ See Nicola Peart, Mark Henaghan and Greg Kelly "Trusts and Relationship Property in New Zealand" (2011) 17 *Trusts & Trustees* 866, at 878 -880.

¹⁴⁹ *Harrison v Harrison* [2009] NZCA 68; [2009] NZFLR 687. See also Peart, Henaghan and Kelly, above n 148, at 878.

A different line of argument was established by Fogarty J in *B v X & CIR*¹⁵⁰ where he held that a settlor who retained a power of appointment over trust assets that enabled him to appoint the assets to himself, had a general power of appointment and could not be holding the assets subject to trust.¹⁵¹ However, for this argument to be valid the holder of the general power of appointment must have the power to appoint the property to any person at all that he or she wishes, so that no person can be identified as capable of holding the appointor to account. A person who holds a general power of appointment owes no fiduciary obligations.¹⁵² Fogarty J considered this was established because the appointor had not acted in a manner that indicated any kind of constraint on his power in relation to trust property, holding that execution of a trust deed alone did not “in reality” create any fiduciary duty.¹⁵³ The legal reality was, however, that the trust deed which conferred the power of appointment was valid and by its terms limited the class of people that the settlor had the power to appoint trust property to. He was only able to appoint trust property to himself, his children, any spouse of his and any charity he chooses.¹⁵⁴ This means that the exercise of the power of appointment was constrained by the duties owed by the appointor to consider the interests of the other beneficiaries when making appointments of property to any of them and so he could be held to account by them.¹⁵⁵ This indicates a major flaw in Fogarty J’s reasoning¹⁵⁶ and the case has been granted leave to appeal on the issue of whether the trust amounted to a general power of appointment.¹⁵⁷

It will be of little value for a spouse who is trying to challenge a dynastic trust, to argue that the holder of a power to appoint trust property actually holds a general power of appointment so that there is no trust. The only way it would be successful is if his or her spouse held the power of appointment and was unconstrained by fiduciary obligation. Asides from the fact that in most cases the trustees will hold this power and be removed from the relationship in question, is very unlikely to be held free of obligation given the purpose of dynastic trusts will generally be to preserve assets for the benefit of specified future generations. There is no basis for raising the argument against any other person who has the power to appoint trust

¹⁵⁰ *B v X & CIR* [2011] 2 NZLR 405 (HC).

¹⁵¹ At [96].

¹⁵² Jessica Palmer “Controlling the Trust” (2011) 12 Otago LR 473, at 484; Peart, Henaghan and Kelly, above n 149, at 880.

¹⁵³ *B v X & CIR*, above n 150, at [96].

¹⁵⁴ At [80].

¹⁵⁵ Jessica Palmer, above n 152, at 483 and 484.

¹⁵⁶ Peart, Henaghan and Kelly, above n 148, at 880.

¹⁵⁷ *D v B* [2011] NZCA 474; [2011] NZFLR 1065.

property because even if the argument was well-founded, the trust assets would be treated as the property of the appointor and remain outside the reach of a relationship property claim.

ii) *Bundle of Rights*

Another development in the law that purports to get around a lack of ‘property’ in any trust assets through discretionary interests has been to treat discretionary interests and powers relating to the trust, particularly the powers to appoint and remove trustees and beneficiaries, as a ‘bundle of rights’ that together amount to property.¹⁵⁸ This is to treat rights that are outside the trust as property, and does not create property rights in the trust assets themselves.¹⁵⁹ Accordingly, it is difficult to conceive of such rights as being capable of valuation or simply being of any value, without somewhat arbitrarily attributing the value of trust assets to these rights, which is inconsistent with the non-proprietary nature of a person’s interest in the trust assets as a discretionary beneficiary.¹⁶⁰

The ‘Bundle of Rights’ argument is controversial although some argue that there can be ‘property’ for the purposes of the P(R)A in rights outside the trust and discretionary interests.¹⁶¹ Regardless, the scope for the argument in the dynastic context is cut short by simply considering the limited implications of treating powers and rights outside the trust as ‘property.’ Even if you could succeed in arguing this ‘property’ had value, in a dynastic trust it won’t be ‘relationship property’ as it will be conferred by a third party, the settlor of a dynastic trust being outside the relationship. It would be analogous to a gift or other disposition from a third party’s trust.¹⁶² To have any relationship property rights through a discretionary interest and/or related powers to a dynastic trust, the argument would have to go so far as treating these rights as ‘property’ in particular assets such as the family home, rather than as ‘property’ in themselves to support a finding of ‘relationship property.’ This would be

¹⁵⁸ *Walker v Walker* 2 NZLR 261 (CA).

¹⁵⁹ *LR v JR (A Bankrupt)* FC Auckland FAM-2008-004-000715, 20 April 2011 at [59]. Compare *JG v JBG FC North Shore* FAM-2007-044-591, 13 July 2010 and the discussion of the bundle of rights in Peart, Henaghan and Kelly, above n 148, at 876.

¹⁶⁰ See: Shelley Griffiths “Valuation of Interests in Discretionary Trusts; Valuing the Invaluable and Unvaluable?” (paper presented to New Zealand Law Society Relationship Property Intensive, August 2010) 55; Peart, Henaghan and Kelly, above n 148, at 875; Jessica Palmer “Controlling the Trust” (2011) 12 Otago LR 473, at 489-493.

¹⁶¹ See Law Commission, above n 144, at [433]- [453]. For support of the theory underpinning the bundle of rights, especially in the context of the Property (Relationships) Act, see Frances Gush, “Relationship Property Rights and Trusts: the “Bundle of Rights Theory?” (LLM Thesis, Victoria University of Wellington, 2011). See also Tobias Barkley “Discretionary Interests and Rights to Replace Trustees: Can they be Property?” (LLM Thesis, University of Otago, 2011) for a theorised view of the proprietary nature of discretionary interests in particular statutory contexts.

¹⁶² Property (Relationships) Act, s 10.

an inherently flawed argument that cannot be substantiated based on the legitimate duties of trustees as owners of the assets owed to all other beneficiaries.¹⁶³

It can be seen then, that common law approaches are of little use in giving a spouse any relationship property rights in dynastic trust property and that this is as much a direct consequence of the P(R)A's structure conferring limited post-relationship entitlements to only beneficially owned property, as the unorthodox nature of arguments challenging the validity of the trust structure or recognising questionable forms of 'property.'

E. Conclusion

Currently the available access routes to trust property at the end of a relationship are of little use in the dynastic context. At one level this is justified by a lack of relationship property rights ever existing over assets that have never been beneficially owned during a relationship. The structure of the P(R)A legitimises the use of the discretionary trust by third parties to ensure future interests in trust property will not be made vulnerable by potential relationship claims. The decision of a parent to put assets into trust in order to preserve them for their children and protect the assets from potential relationship property claims their children might face, is not within the scope of the P(R)A.

At another level, the situation remains that the trust property is integrally involved in a relationship and is therefore treated in a manner that involves contributions to the assets creates expectations of shared interests arising from the relationship efforts. Section 182 FPA might provide an ability to fulfil reasonable expectations, but only where the property has been settled with a sufficiently nuptial character which will seldom be the case in a dynastic trust. Other proprietary remedies will be of limited application because they require a claim to be made out against trustees who will, most likely, be removed from the situation. The potential for a remedy arising through an attack on trust validity is also likely to be pointless seeing as there would need to be clear relationship property rights in the assets once the ownership barriers of trust are removed and this will be difficult to establish when the trust has been settled outside the relationship.

¹⁶³ Tobias Barkley, above n 161, at 61; Nicola Peart "Intervention to Prevent the Abuse of Trust Structures" [2010] NZ L Rev 541, at 590-591.

It is clear that dynastic trusts generally provide a strong fortress against relationship based property claims. The situation does leave some questions open, however, particularly in relation to the displeasing outcome for Ms Kidd. She is left in a situation of having no substantive property or resources and is therefore liable to become a burden on the state to bridge the gap between her married life and any future wealth she can begin to accumulate. In other jurisdictions such as England and Australia, which will be discussed in the following chapter, spouses do not face the same level of difficulty. Ultimately this supports deeper analysis in Chapter Four, as to why spouses face such challenges to prove entitlement to dynastic trust assets at the end of their relationships in New Zealand. Underlying all of these considerations is the question: on what basis could the castle-like protection these trusts seem to create over assets, be made vulnerable to counteract economic disadvantage generated by relationships and the financial need that arises for the spouse who is left without the trust's support?

III. Overseas Approaches to Accessing Trust Property and the Role of the ‘Dynastic Argument’ in England and Australia

This chapter will provide a brief overview of how post-relationship access to trust property is dealt with in England and Australia respectively. It will then consider, for both jurisdictions, the approach to the ‘dynastic argument’ and to what extent property settled on a trust outside a relationship is vulnerable to relationship-based claims.

A. England

i) *The English approach to dividing property post-relationship.*

The Matrimonial Causes Act 1973 (‘MCA’) governs the provision of ancillary relief to spouses at the end of a marriage.¹⁶⁴ This encompasses a very broad discretion to make a wide range of orders for property distributions or adjustments following marriage breakdown.¹⁶⁵ Under s 25 MCA the court is required to take into account a range of considerations in determining which orders are to be made in all the circumstances of each case.¹⁶⁶ An immediate contrast can be drawn with our P(R)A in that a spouse’s entitlement to property under the MCA is entirely at the court’s discretion and is not contingent on relationship contributions connected to the property available for redistribution.¹⁶⁷ The overarching determinant of outcomes under the MCA is provided by the touchstone of ‘fairness’¹⁶⁸ guided by three principles identified by the House of Lords in *Miller and MacFarlane*.¹⁶⁹ Essentially the rationales that underpin the redistribution of wealth at the end of a marriage are: 1) the needs generated by the relationship between the parties; (2) compensation for relationship-generated disadvantage; and (3) the sharing of the fruits of the matrimonial partnership.¹⁷⁰ It is important to recognise that unlike the MCA, which deals with all financial and property matters on divorce, New Zealand has a separate regime to address provision for financial

¹⁶⁴ The Matrimonial Causes Act 1973 (UK) only applies to marriage as ancillary orders can only be made upon divorce proceedings.

¹⁶⁵ Matrimonial Causes Act, ss 23, 24 and 24A. Section 23 states the range of financial orders able to be made in connection with divorce proceedings, including lump sum or periodical payments. Section 24 provides a range of property orders that can be made.

¹⁶⁶ See Matrimonial Causes Act, s 25(2)(a)-(h).

¹⁶⁷ Essentially the English system enables all considerations to be made in the same proceedings including assessments of living standards, financial need, income and earning capacity. The P(R)A is applicable only to relationship property which is essentially the fruits of the marriage.

¹⁶⁸ *White v White* [2001] 1 AC 596 (HL).

¹⁶⁹ *Miller v Miller; MacFarlane v MacFarlane* [2006] UKHL 24; [2006] 2 AC 618.

¹⁷⁰ *Miller; MacFarlane*, above n 169 at [139]-[144] per Baroness Hale of Richmond.

needs in the FPA's spousal maintenance provisions.¹⁷¹ This means that holistic considerations of financial circumstances at the end of a relationship don't fit neatly into the New Zealand system, which provides discrete principles for spousal entitlements based on need and those based on relationship property rights.

ii) *Accessing Trust Property under the Matrimonial Causes Act 1973*

In pursuit of achieving a fair financial outcome between spouses when their marriage ends, trust property can be relevant in two ways. First is where the trust constitutes a nuptial settlement, the court can make an order to vary the terms of trust in the same way the New Zealand courts can under s 182 FPA, discussed in Chapter Two. This is an order directly against trust. The second and much broader way trust assets can be included in the court's determination of post-marital entitlement, is as a consideration under s 25 of each spouse's likely 'financial resources.' This does not lead to a direct order against trust assets but involves attributing trust assets to a spouse in accounting for the wealth available to be distributed.

a) **S 24(1)(c): Nuptial Settlements**

Section 24(1)(c) MCA gives the court a dispositive power over trust assets that fall under any 'ante or post nuptial settlement made on the parties.'¹⁷² However, unlike New Zealand's equivalent power, any order to vary a nuptial settlement is made as a part of the wider consideration of relief orders appropriate in a particular case. As with all decisions for making orders under ss23-24A MCA, in deciding whether to vary a trust and if so how, the objective is to achieve an overall result that is fair to both parties.¹⁷³ The starting point is always going to be consideration of the factors in s25(a)-(h).¹⁷⁴ Once the power can be engaged, any variation of the trust remains at the court's discretion and will be fact specific.¹⁷⁵ For example, in *Ben Hashem*¹⁷⁶ the court considered it was fair to the wife to

¹⁷¹ Family Proceedings Act 1980, ss 60-100.

¹⁷² As discussed in Chapter Two, the English interpretation of 'nuptial settlement' is the same as the New Zealand approach requiring the settlement be made in reference to a particular marriage. However, as will be seen in the following considerations, there is clear distinction in the guidelines for the exercise of the discretionary power.

¹⁷³ *Ben Hashem v Al Shayif* [2008] EWHC 2380 (Fam); [2009] 1 FLR 115 at [290].

¹⁷⁴ *Ben Hashem v Al Shayif*, above n 173.

¹⁷⁵ For a recent overview of the authorities relating to the issues of ancillary relief orders and trust property see *BJ v MJ (Financial Orders: Overseas Trusts)* [2011] EWHC 2708 (Fam) at [7]-[13].

provide her with shares in a company that was the subject of a post nuptial settlement and to transfer houses owned by the company based on her financial need. This could enable a spouse such as Ms Kidd to have a better chance of being provided for, having financial need taken into account rather than simply the reasonable expectations of the parties. However the success of her being able to access assets held on the Hilversum trust under the English provision would still be challenged by establishing the nuptial character of any settlement on that trust.

b) S 25: Likely financial resources

When either spouse has a discretionary interest in a non- nuptial settlement, it can be taken into account when the court considers all other ‘financial resources’ that each party ‘has or is likely to have in the foreseeable future.’¹⁷⁷ Even though discretionary interests afford no proprietary right to trust assets, the scope and flexibility of ‘financial resources’ indicates that the court is not merely concerned with ownership when making financial orders.¹⁷⁸ The test is whether the trustees would be likely to advance trust capital immediately or in the foreseeable future to a beneficiary.¹⁷⁹ Importantly, this is not a question of control over trust assets but one of immediate access to trust property through the factual likelihood of trustees exercising their discretionary power in a manner that makes trust assets available.¹⁸⁰ This can be determined by looking at the terms of trust, history of dispositions and previous patterns of provision for the spouses, as beneficiaries.¹⁸¹ If the court is satisfied that it is likely the trustees would make trust property available to a beneficiary if requested then, taking into account the spouse’s capacity as discretionary beneficiary to compel trustee consideration, it will effectively attribute trust assets to the spouse.

This process creates a risk that assets would be attributed to a spouse when it is also within trustee discretion *not* to make any disposition to a beneficiary. However, the point is to make

¹⁷⁶ *Ben Hashem v Al Shayif*, above n 164.

¹⁷⁷ Matrimonial Causes Act, s 25(2)(a).

¹⁷⁸ *Whaley v Whaley* [2011] EWCA Civ 617; [2012] 1 FLR 735 at [113] per Lewison J.

¹⁷⁹ *Charman v Charman* [2005] EWCA Civ 1606; [2006] 1 WLR 1053 at [13]; *Whaley v Whaley*, above n 178, at [40]. The likelihood test is on the balance of probabilities: *Whaley v Whaley*, above n 178, at [44] per Black LJ.

¹⁸⁰ *Whaley v Whaley*, above n 178, at [113].

¹⁸¹ See for example, *Charman v Charman*, above n 179; *Whaley v Whaley*, above n 178; *SR v CR* (Ancillary Relief: Family Trusts) [2008] EWHC 2329 (Fam); [2009] 2 FLR 1083, where these considerations were all relevant to determining the factual likelihood of provision of resources from the trust in question.

realistic assessments of available resources¹⁸² and penetrate the appearance of a lack of wealth, which could affect the process that the court is undertaking in determining ancillary relief.¹⁸³ The court will not put undue pressure on or usurp the discretion of, a third party so that the means of a spouse is enhanced. It will however, make orders that provide ‘judicious encouragement’ to trustees to enable a spouse to have the means of complying with court orders.¹⁸⁴ For example, in *Charman v Charman*,¹⁸⁵ the Court of Appeal upheld an order against the husband to pay a lump sum of £40 million to his wife as part of her share of a total asset pool valued at £131 million, which included £68 million worth held by a trust settled by the husband. This indirectly encouraged the trustees to make property available to him to meet this obligation.

c) The relevance of the ‘dynastic’ argument

When a trust is settled for the legitimate interests of parties outside the marriage, it is argued that the court has no power to attribute trust assets under s 25 because this would be to interfere with the rights of third parties.¹⁸⁶ If a trustee owes duties to other beneficiaries it could make encouragement to exercise discretion one way seem more like compulsion to do so, which is impermissible.¹⁸⁷

In *Whaley v Whaley*¹⁸⁸, a big money case which involved a wife’s successful claim that her husband’s discretionary interest in wider family trusts settled originally by his parents meant trust property was a ‘financial resource’, the Court of Appeal made clear that the test is the same regardless of the origin of the settlement.¹⁸⁹ It is a question of fact, when a spouse has a

¹⁸² *Whaley v Whaley*, above n 178 at [114] per Lewison J.

¹⁸³ *Thomas v Thomas* [1995] 2 FLR 668 (CA) at [3] per Waite LJ: “The discretionary powers conferred on the Court by the amended ss 23-25A of the Matrimonial Causes Act 1973 to redistribute the assets of spouses are almost limitless. That represents an acknowledgement by Parliament that if justice is to be achieved between spouses at divorce the Court must be equipped, in a society where the forms of wealth-holding are diverse and often sophisticated, to penetrate outer forms and get to the heart of ownership.”

¹⁸⁴ *Thomas v Thomas*, above n 183, at [3]; *Whaley v Whaley*, above n 178, at [114] per Lewison J; *SR v CR* above n 181. This is not the same as imposing a direct order against trustees. The Court in *BJ v MJ*, above n 175, at [24] notes that the ‘judicious encouragement’ can operate to give disproportionate allowances to non-trust assets, leaving the trust to provide to the beneficiary spouse to make up the gap, which the Court has already found the trustees are likely to do.

¹⁸⁵ *Charman v Charman*, above n 179.

¹⁸⁶ *Thomas v Thomas*, above n 183, at [3].

¹⁸⁷ *A v A* [2007] EWHC 99 (Fam); [2007] 2 FLR 407 at [85] per Munby J, who also notes that the trustees may ignore any judicious encouragement and it would be within their duties to do so.

¹⁸⁸ *Whaley v Whaley*, above n 178.

¹⁸⁹ *Whaley v Whaley*, above n 178, at [48] per Black LJ who made clear he did not consider this a technical label of trust, “still less some kind of ancillary relief concept with its own body of attendant principles.”

discretionary interest in any trust, whether the trustees would in the circumstances be likely to advance income or capital on request. Although:¹⁹⁰

”plainly the court will have regard to the circumstances of the particular trust - how it came into being, who the beneficiaries are, what duties the trustees have, what other relevant terms there are, how it has been administered in practice and so on - in answering the question and in determining, in due course, what ancillary relief order to make”

The width of the likelihood test means that dynastic trust assets can be available to a spouse in circumstances where the test is met.¹⁹¹ The court is aware that because of “a desire to protect family wealth from invasion in the throes of divorce... a protective attitude may lead to an artificial presentation of the underlying reality which [the court] must attempt to penetrate”.¹⁹² In *SR v CR*¹⁹³ the court held that assets held in a group of trusts settled by the husband’s father and administered by a range of corporate trustees, in which the husband had a discretionary interest, were able to be attributed to him even though the settlor indicated this would be against his wishes.¹⁹⁴

iii) *Summary: Ms Kidd’s Position Under English Law*

It is inherent in the breadth of the English approach to ancillary relief that there needs to be no causative or contributory connection between the property and the marriage; it is simply a question of fact whether assets amount to ‘resources’. The court then has discretion as to how these resources should be taken into account.¹⁹⁵ It is important to remember that, unlike New Zealand, there are broader grounds for justifying taking account of wider resources, with financial need being a key determinant of the orders the court will make.

¹⁹⁰ *Whaley v Whaley*, above n 178, at [54] per black LJ.

¹⁹¹ It also means that if it is not proved to be a reality that the assets would be immediately accessible the court will not take them into account. In *TL v ML and others* [2005] EWHC 2860 (Fam); [2006] 1 FLR 1263 the Court noted the difference between potential resources through wider family wealth being available if the family should choose to apply their property in a particular way and property that was subject to fiduciary obligations to consider a beneficiary’s interest. It is a donor’s prerogative to choose not to apply his or her own property to make resources available for someone else, whereas a fiduciary is obliged to consider doing so.

¹⁹² *SR v CR*, above n 181, at [64].

¹⁹³ *SR v CR*, above n 181.

¹⁹⁴ *SR v CR*, above n 181, at [56]. In this case the couple had been financially supported by the trusts but the settlor’s son had drug dependency issues and an extravagant lifestyle with his wife and family costing around £1million per annum. At the end of the marriage there was insufficient absolute property to maintain this standard of living. The settlor had indicated he would no longer keep making trust money available to his son but the trustees, having a history of providing, indicated they would make funds available.

¹⁹⁵ *G v G (Financial remedies; Short Marriages: Trust Assets)* [2012] EWHC 167 (Fam) at [80] outlines this two stage approach.

Overall it is clearly a question of fact whether trust resources are to be taken into account and if so to what extent.¹⁹⁶ If Ms Kidd had lived in England she may have been successful. Indeed, *RK v RK*¹⁹⁷ was a decision that was very similar to Ms Kidd's case. The main property subject to the husband's wider family trust was the family farm. The couple lived in a house owned by a family company in which the trust had 15% shares. The wife was successful in trust property being made available to her and the trust provided her with a house and car which is quite a contrast to the outcome the PRA afforded Ms Kidd. What is most interesting in the case is the underlying acceptance by the trustees of a duty to make some provision.¹⁹⁸ Fundamentally, the outcome is driven by the needs based rationale for distributing resources post marriage.

B. Australia

i) The Australian approach to dividing property post-relationship.

The Family Law Act 1975 (Cth) ('FLA') provides the statutory basis for distributing property at the end of a marriage in Australia.¹⁹⁹ Under s 79, the Court is empowered to make any orders it considers appropriate relating to 'property of the parties to a marriage.'²⁰⁰ Similar to the English system, the overarching control over the court's decision is a broad mandate not to make any order 'unless it is just and equitable' to do so.²⁰¹ In determining this, there are a number of considerations the court must take into account, essentially focusing on the parties' relative contributions to both the marriage and property, and also the financial needs of each spouse.²⁰² In contrast with the P(R)A, the relative property entitlements at the end of a

¹⁹⁶ *RK v RK* [2011] EWHC 3910 (Fam) at [60].

¹⁹⁷ *RK v RK*, above n 196.

¹⁹⁸ Despite the potentially greater access to trust property in the English system it is worth considering the practical impact of this kind of litigation. The costs are high and to an extent the pressure on the family and emotional strain of this unsettled dispute seemed to encourage agreement. See *RK v RK*, above n 196.

¹⁹⁹ As of 1 March 2009 the Federal jurisdiction for distributing property has been extended to de facto couples, including same sex couples. For simplicity, this part of Chapter 3 is focused on marital relationships although it is relevant that the court's statutory powers over de facto property are worded in the same way under Part VIIIAB of the Family Law Act. This paper has insufficient scope to discuss in detail the potential differences de facto relationships will have in affected discretionary interests in trusts, but it is likely that the law will apply in a similar fashion to de factos.

²⁰⁰ Family Law Act, s 79(1).

²⁰¹ Family Law Act, s 79(2).

²⁰² Family Law Act, s 79(4) lists the considerations the court is to take into account. Generally the assessment process involves four stages: 1) establish the identity and value of property, liabilities and financial resources of the parties; 2) determine contribution based entitlements to property pursuant to ss79(4)(a), (b) and (c), covering both financial and non-financial contributions to the marital relationship, and express entitlement as a percentage of the net value of the property of the parties; 3) make adjustments if required based on relative

marriage are at the court's discretion, reflecting justice and equity in the circumstances of each case.

ii) *The Relevance of Trust Property under the Family Law Act 1975*

The FLA's approach to distributing property enables trust assets to be relevant in a number of ways when a marriage ends. Firstly, when trust assets are considered to be the 'property of the parties or either of them,' the court has direct jurisdiction to make orders against that property.²⁰³ The scope of 'property' under s 79 has been interpreted widely; potentially encompassing assets that neither party has a legal or equitable property interest in, such as where any interest is subject to discretionary powers of appointment.²⁰⁴ A discretionary interest can also be indirectly relevant in the consideration of 'financial resources' of either party, which can affect the quantum of shares in the 'asset pool'²⁰⁵ each party is entitled to. This will not enhance the overall amount of property available for redistribution. Finally, orders can also be made against property that is dealt with by any ante or post nuptial settlements relating to a marriage.

a) Discretionary trust assets as 'property of the parties' under s 79

The first stage of inquiry into the alteration of property interests of a married couple is to determine what, at the date of hearing, constitutes the 'property of the parties.'²⁰⁶ In *Kennon v Spry*²⁰⁷ the majority of the High Court of Australia²⁰⁸ made clear how wide the meaning of

available resources and financial need of the parties, taking into account the factors in s 75(2), such as financial resources; 4) based on these findings the Court must decide what orders are just and equitable in all the circumstances of the case. See *In the Marriage of Hickey* [2003] FamCA 395; 30 Fam LR 355 at [39], which summarises earlier authorities into these four steps.

²⁰³ Family Law Act, s 79(1). Note also, s 90AE (2) expressly empowers the court to direct third parties or alter the interests and liabilities of third parties in orders under s 79. See *Stephens v Stephens* [2009] FamCAFC 240 where the Court in enforcement proceedings against Dr Spry made orders directly against trust assets.

²⁰⁴ *Kennon v Spry* [2008] HCA 56; (2008) 251 ALR 257 per majority Gummow & Hayne JJ and per French CJ; *Ogden v Ogden* [2010] FMCAfam 865; 245 FLR 1. Compare *Harris v Harris* [2011] FamCAFC 245; *Morton v Morton* [2012] FamCA 30 where discretionary interests without direct or indirect control over trust assets were not enough to constitute 'property.'

²⁰⁵ This term was used in *Kennon v Spry* to describe the 'property of the parties to a marriage' over which the court has powers to alter the parties' respective interests in. See *Kennon v Spry*, above 204, at [115] and [130] per Gummow and Hayne JJ.

²⁰⁶ *In the Marriage of Re Hickey*, above n 202; *Kennon v Spry*, above n 204, at [51] per French CJ. The Family Law Act, s4(1) defines 'property' as "(a) in relation to the parties to a marriage or either of them--means property to which those parties are, or that party is, as the case may be, entitled, whether in possession or reversion"

²⁰⁷ *Kennon v Spry*, above 204.

‘property’ is in this context. In that case the assets held in a discretionary family trust were property under s 79, in circumstances where the husband was the settlor and sole trustee, but not a beneficiary, and the wife was only one of a wide range of discretionary objects of the husband’s powers.²⁰⁹ The Court considered the trust assets, in conjunction with the husband’s power to appoint trust property to his wife and the wife’s right to due consideration²¹⁰ were property for the purposes of the Family Law Act, albeit not property under the general law.²¹¹ Heydon J, however, gave a strong dissenting judgment based on the inability of any interest Mrs Spry had in the trust to support any ‘property’ in the assets she claimed. Even if her right to compel due consideration from her husband as trustee was property, this did not justify accounting for the assets that were subject to this consideration in s 79 orders.²¹² Further, Heydon J made clear that trust obligations owed by a spouse who owns assets as trustee and the consequent limit on that owner’s rights in relation to those assets cannot be ignored for the purpose of s 79 orders.²¹³

The majority decision has been controversially received,²¹⁴ as it indicates that the court has “robust powers” against discretionary trusts under the FLA.²¹⁵ However, whether trust assets form part of the asset pool in a given case is very much a question of fact.²¹⁶ In subsequent cases it is clear that control over trustee power is fundamental to including trust assets as property of the parties under s 79²¹⁷ and the focus of the majority in *Spry* on the relative rights and duties of the parties to the marriage in relation to the trust assets supports this.²¹⁸ Consequently, the application of *Spry* to trusts that have been settled by neither spouse

²⁰⁸ *Kennon v Spry*, above 204, at [1]-[84] per French CJ and at [85] – [142] per Gummow and Hayne JJ.

²⁰⁹ This is a very simplified account of a complex fact scenario but entails the relevant points for the purposes of this discussion.

²¹⁰ *Kennon v Spry*, above 204, at [81] per French CJ.

²¹¹ *Kennon v Spry*, above 204, at [78] per French CJ and at [126] per Gummow and Hayne JJ.

²¹² At [164] per Heydon J.

²¹³ At [175] per Heydon J.

²¹⁴ For a sample range of articles and views of the case see: Peter Hannan “*Kennon v Spry*: An Extended Reach For s 79?” (2010) 1 Fam L Rev 18; Philip Hallen and Hayley P Bennet “*Kennon v Spry* and the Elephant in the Room: Women, Divorce and Discretionary Trusts in the 21st Century” (2011) 17 Trusts & Trustees 829; Lee Aitken “Muddying the Waters Further - *Kennon v Spry*: ‘Ownership,’ ‘Control’ and the Discretionary Trust (2009) 32 Aust Bar Rev 173; Michael Brown “His, Hers or Theirs?” (2009) 47 LSJ 60; J Gleeson SC “*Spry*’s Case: Exploring the Limits of Discretionary Trusts” (2010) 84 ALJ 177; Patrick Parkinson “Family Trusts and Third Parties Under the Family Law Act 1975” (2012) 26 AJFL 5.

²¹⁵ Brown, above n 214, at 63.

²¹⁶ *Ogden v Ogden*, above n 204, at [38].

²¹⁷ *Morton v Morton*, above n 204; *Harris v Harris*, above 204; *Stephens v Stephens*, above n 203; *Ogden v Ogden*, above 204.

²¹⁸ Hannan, above n 214, at 26.

appears to depend on the degree of control a spouse has over the trust property, rather than classification as ‘property’ being determined solely by the source or origin of the assets.

b) ‘Property’ in the dynastic context

In *Harris v Harris*,²¹⁹ a case involving a husband’s discretionary interest in a family trust originally settled by his father, the court held that discretionary interests in trust assets can only be considered ‘property’ where that beneficiary has direct or indirect control.²²⁰ In this case the husband was neither trustee nor did he have any powers of appointment. However, the wife argued that in fact he had control over the administration of the trust in the context of his family relationships; his mother held the power of appointment of the trust and was one of three directors of the trustee company. The court held that ‘indirect’ control referred only to a ‘puppet’ scenario where the trustees are effectively the puppet of the spouse so that the exercise of their discretion is compelled by the wishes of a party to the marriage, which was not supported on the evidence. The husband’s mere discretionary interest did not constitute ‘property’ under s 79.

However, in *Ogden v Ogden*²²¹ the court did treat a wife’s interest in a trust settled by her mother, for the benefit of her five children and their immediate families, as property under s 79. The trust had been intended to ensure capital was preserved for the settlor’s grandchildren, although the deed authorised vesting date to be determined by the trustee. The trustee was a company of which each of the five children was a director. Although the wife had no legal title to trust assets herself, the trust deed gave her a power to appoint a trustee over one fifth of the capital for her class of beneficiaries (herself, her spouse and their children). The court considered this meant the wife had sufficient control over that portion of trust capital for it to be treated as ‘property of the parties.’ This was irrespective of the fact that the parties had in no way contributed to the assets in question. The dynastic origin of the property (or rather the lack of contributions of the marriage to the acquisition of the ‘property’) was relevant in the quantum of entitlement the husband was awarded, which the court determined as being 10% of the wife’s share of the trust capital.

²¹⁹ *Harris v Harris*, above n 204.

²²⁰ *Harris v Harris*, above n 204, following *Kennon v Spry*, above n 204, at [77] per French CJ.

²²¹ *Ogden v Ogden*, above n 204.

It is clearly possible to access dynastic trust assets under s 79, whether or not the property is a product of, or otherwise specifically related to, the marriage. However, the connection between the trust property and the marriage was significant in the *Spry* decision²²² and it could be argued that the source of trust property being external to the marriage should be relevant to determining whether trust property is really ‘property of the parties to the marriage.’²²³ In *Pickle v Pickle*²²⁴ the husband had a discretionary interest in and power of appointing trustees over property that had been re-settled from a trust that his parents originally settled their family home on decades earlier. Although the trust had subsequently acquired further assets that were subject of the resettlement, the court put emphasis on the property only being acquired out of original trust property and not representing property that either husband or wife could have acquired in their personal capacity. The ‘origins and character’ of the assets held in the trust meant it was not property under s 79.²²⁵

The range of treatment of property subject to a discretionary trust indicates varying responses to the underlying justification for making trust property available for post-marriage distribution. This is the product of having discretionary powers over contemporaneous consideration of financial need and contributions which is absent from New Zealand’s relationship property regime. Even so, it is unlikely Ms Kidd would have fared better under the FLA, as there was no indication that Stephen van Den Brink had any kind of control over the Hilversum trust, being neither a trustee nor having any powers of appointment.

c) Discretionary interests as ‘financial resources’

Where a spouse has insufficient control over the trust assets to constitute property, a discretionary interest in trust could still be considered as a ‘financial resource’ in Australia.²²⁶ As a ‘financial resource,’ the ability to access trust property through rights held as discretionary beneficiary is relevant to the court’s determination of what orders it will make

²²² *Kennon v Spry*, above 204, at [64] per French CJ.

²²³ See Parkinson, above n 214.

²²⁴ *Pickle v Pickle* [2010] FMCAfam 1181.

²²⁵ At [43(i)].

²²⁶ For a recent example of the distinction see *Morton v Morton*, above n 193, where the Court held that although the husband lacked sufficient control over trust assets to consider his discretionary interest in trust amounted to property under s 79, the trust assets were able to be considered as financial resource.

to alter the property interests of the parties.²²⁷ However, there is no jurisdiction to make orders altering the parties' interests in 'resources,' only 'property.'²²⁸

Where a spouse has potentially substantial resources available to them through a dynastic trust it might affect the proportion of entitlement he or she receives in assets that do form part of the property pool. But in terms of actually accessing trust assets the s 79 avenue, where available, is more direct. The Court is able to make orders binding a third party to meet orders made under s 79²²⁹ so can impose orders against trust property itself rather than relying on a personal order against the spouse, which is what the English courts do. This highlights the significance of including discretionary trust assets as 'property' being the actual enhancement of the asset pool available for distribution. Applying the resources/property distinction to Ms Kidd's situation, her husband's interest in the Hilversum Trust could have enabled her to have a greater share of any property held between herself and her husband. She would still face the problem, as under New Zealand law, of no property existing outside the trust.²³⁰ The ability for the court to consider the trust is then futile, unless she could establish her husband had 'property' in the trust.

d) S 85A: Nuptial Settlements

Section 85A enables the court to make any order that is 'just and equitable' against property that is 'dealt with by ante or post nuptial settlements made in relation to the marriage.' The nuptial characteristic of a settlement creates a jurisdictional requirement to exercise this broad power, as with the English and New Zealand equivalents.²³¹ Traditionally the Australian courts have interpreted the 'nuptial' element as requiring settlement be made for a particular

²²⁷ Family Law Act, s 79(4) incorporates s 75(2) factors as mandatory considerations, which includes 'financial resources.' See *Stephens v Stephens*, above n 203, at [67]-[68] per May, Boland and O'Ryan JJ.

²²⁸ Hannan, above n 214, at 20.

²²⁹ Family Law Act, s 90AE(2)(b). This provision is not able to be used to enhance the property pool of the parties by ordering distribution. Rather, it is to be used to give effect to orders made under s 79, which can only be made against existing 'property.' In *Hunt v Hunt and Others* [2006] FamCA 167; (2006) 36 FamLR 64 at [113] the Court of Appeal made clear that s 90AE(2)(b) does not contemplate an arbitrary invasion of rights of a third party but an alteration of those rights where they are sufficiently connected to the division of the property between the parties of the marriage.

²³⁰ The actual finding was that no 'relationship property' existed. If Stephen van den Brink had personal assets that were 'separate property' under the P(R)A these could be included under s 79 assessment and then his interest in the trust as a potential resource could justify the Court altering the interest in his own property insofar as the Court might consider it 'just and equitable', taking into account Ms Kidd's relationship contributions and her financial need.

²³¹ Matrimonial Causes Act 1973 (UK), s 24(1)(c) discussed above; Family Proceedings Act 1980, s 182 discussed Chapter 2. All jurisdictions consider trusts to constitute settlements in this context.

marriage.²³² The scope of this was viewed widely by Kiefel J in *Kennon v Spry*.²³³ She held that the context and purpose of s 85A is to enable the court a wide power over property that is settled with sufficient association to the marriage that is the subject of proceedings.²³⁴ This association will often exist where, during the marriage, property has been allocated to trust and the settlement by its terms makes provision for the parties.²³⁵ On Kiefel J's reasoning, the question is whether the 'nuptial element' exists at the time of each disposition of property to a trust, as each disposition is a 'settlement' of a trust over that property, impressing it with a trust obligation.²³⁶ This approach enables s 85A to be used to appropriately reflect the marital contributions to trust property, irrespective of the terms of trust providing for the benefit of parties outside the marriage.²³⁷

The impact of Kiefel J's view should not be overstated; Heydon J disagreed and the majority of the High Court did not mention s 85A, preferring to see utility in s 79 powers for dealing with trusts.²³⁸ Even if a wider view of nuptial character is taken, the only property against which orders can be made will be that which is subject to the particular settlement that has a nuptial character, rather than all trust assets.²³⁹ Further, where the trust acquires property out of its own resources, rather than property being 'settled,' a pre-existing nuptial character of the trust would be required to enable orders against that property to be made.²⁴⁰ This indicates

²³² *Kennon v Spry*, above n 204, at [186] per Heydon J. This accords with the English and New Zealand approaches to 'nuptial settlements,' as discussed earlier in this and the previous chapter.

²³³ *Kennon v Spry*, above n 204.

²³⁴ See *Kennon v Spry*, above n 204 at [209], [218]-[228] per Kiefel J for the overview of the context and purpose of s 85A.

²³⁵ *Kennon v Spry*, above n 204, at [230]. On the facts of *Kennon v Spry*, Kiefel J considered the requisite association (made in relation) to the marriage existed where the trust was used to hold property for the benefit of the parties engaged s 85A; the trust acquired a nuptial element over that property irrespective of there being no nuptial character when Dr Spry first settled the trust long before his marriage to Mrs Spry. Importantly, the wider terms of s 85A enabled this broader approach as Kiefel J recognised in distinguishing English authorities.

²³⁶ *Kennon v Spry*, above n 204, at [229] per Kiefel J. As discussed in Chapter Two, this has been accepted by the New Zealand Court of Appeal as at least being arguable: *Kidd v Van Den Brink* [2010] NZCA 169. It is important to note, however, that Kiefel J was concerned with the purpose of s 85A being to recognise continuous contributions to trust though the marriage and that the statutory framework requiring contributions to be considered is quite distinct from the scope of Family Proceedings Act, s 182 pursuant to the Supreme Court interpretation in *Ward v Ward* [2009] NZSC 125; [2010] 2 NZLR 31.

²³⁷ *Kennon v Spry*, above n 204, at [231] per Kiefel J.

²³⁸ Hannan, above n 214, at 26.

²³⁹ See Paul Brereton, Judge of the Supreme Court New South Wales "The High Court and Family Law – Two Recent Excursions" (address to Family Court and Federal Magistrates Court Concurrent Conference, Canberra, 10 October 2010) who notes that Kiefel J does not consider this in her judgment.

²⁴⁰ In *Pickle v Pickle*, above 224, the Full Court held that Kiefel J's view of s 85A only applies to assets which the parties have contributed to throughout the course of their marriage and which are held for their use and benefit. See also Brereton, above n 239, at 27. As an aside, it could be argued that orders available under s 85A only attach to 'property' that is dealt with by settlement so a merely discretionary interest in a trust would not be available as property. See Parkinson, above n 214. However, I disagree because s 85A refers to property 'dealt with by settlement.' The nuptial character connects the settlement to the marriage, not the nature of either

that s 85A could be applicable to some but not all trust assets, which also demonstrates the importance of s 79 being available to access trust property for a claimant spouse.

When trust assets are the subject of a ‘nuptial settlement’ the relative entitlements are determined by the court. Although s 85A is separate from the alteration of property interests under s 79, the same considerations are relevant in terms of influencing how the court will exercise its discretion to make just and equitable orders.²⁴¹ This enables contributions to the relationship, as well as financial needs to be taken into account in making orders against trust property, which gives s 85A a much broader scope to provide from trust than New Zealand’s reasonable expectations test. The overall purpose of achieving just and equitable outcomes makes s 85A much more available to a spouse like Ms Kidd, if the ‘nuptial’ jurisdiction is met in relation to a particular settlement.

iii) *Summary: Ms Kidd’s position under Australian Law*

There are much wider powers to access or take into account discretionary trusts in Australia than in New Zealand. The dynastic nature of a trust is not necessarily determinative of an inability to access. Nonetheless, the facts of *Kidd* make it unlikely that Ms Kidd would have been more successful in Australia.

C. Conclusion

The scope of both the MCA in England and the FLA in Australia enables much broader considerations of a range of factors that the P(R)A is not concerned with. This enables trust property to be available in a way that the P(R)A cannot justify, being premised only on an ability to adjusting property that represents the relationship efforts and to do so equally. The holistic view of financial need and property entitlement in these regimes, alongside the discretion available to adjust outcome to fit the reality of a particular case, means that the connection between assets and a relationship is able to be more remote if a case requires that one spouse provide for compensation or meet the needs of the other spouse. At the same time,

party’s property rights in the settlement. It is the property that is subject to the settlement against which an order can be made.

²⁴¹ S 85A(2) expressly says the court is to consider the factors listed in s79(4).

the existence of other interests in trust property is relevant in both systems, able to be accounted for alongside the 'relationship' considerations.

IV. Understanding the Conceptual Barriers Between ‘Relationship Property Rights’ and Dynastic Trusts

The protection a dynastic trust offers assets that have been relevant to a particular relationship is significant. It has been made clear from the outset of this paper that currently in New Zealand, post-relationship access to dynastic trust assets, no matter how integral to a relationship, will be rare if at all possible. Fundamentally this is because assets which are subject to a dynastic trust sit outside the relationship and the connection between any assets specifically and a particular relationship is too remote to base any ‘relationship property’ claim on. The significance of the proprietary conception of entitlement that is inherent in the P(R)A is evident when compared to the systems in place in England and Australia which enable much wider considerations to justify provision being made for a spouse, primarily through financial need.

This chapter argues that there is no justified basis for recognising post-relationship claims to dynastic trust assets within the current conceptual framework of New Zealand’s relationship property regime. Any entitlement related to the trust would need to be rationalised on a non-proprietary basis.

A. Re-visiting the Limited Concept of ‘Relationship Property Rights’

As discussed in Chapter One, the scheme of the P(R)A, which creates relationship property rights, is to remedy inequality in property benefits arising from contributions to a relationship. This means the objective of equalising relationship contributions is only structurally supported by powers to adjust proprietary entitlements that are sufficiently connected to the relationship efforts.

Although the P(R)A is considered to be “social legislation in its widest form”²⁴² that “cuts across the normal rules of property law,”²⁴³ the conferral of relationship property rights is not based on any wide view of achieving general economic equality between spouses at the end of their relationship. Unlike the English and Australian jurisdictions, the P(R)A provides no

²⁴² *Reid v Reid* [1979] 1 NZLR 572, at [59].

²⁴³ Nicola Peart, Mark Henaghan and Greg Kelly “Trusts and Relationship Property in New Zealand” (2011) 17 *Trusts & Trustees* 866, at 868.

basis for orders being with overall fairness of outcome. Rather the objective is for ‘just division’²⁴⁴ of relationship property.

i) *The Necessary Proprietary Connection*

The short answer to why there can be no ‘relationship property rights’ in dynastic trust assets is because neither spouse has beneficial ownership of any asset subject to the trust. This means there is no proprietary basis on which a relationship property claim could attach to any asset held in the trust. This is supported by considering that the absence of beneficial ownership in an asset is not the only determinative of a spouse’s lack of property rights in that asset at the end of his or her relationship. Any question of justifying access to assets in the absence of beneficial ownership is hamstrung by the secondary need for the asset to constitute ‘relationship property.’ This is because there is no right of general access to all property that *is* beneficially owned by either spouse; the P(R)A is only ever going to modify property rights in a limited class of property. Relationship based entitlements to property must therefore be conceived on a specific asset basis which requires a sufficient proprietary connection between the asset and the relationship. The dynastic context presents a unique challenge to this conception of post-relationship entitlement. This is because, if an asset has never been in the beneficial ownership of either spouse, on what basis can the asset be considered sufficiently relevant to the relationship to support a ‘relationship property’ claim? Without beneficial ownership no specific asset can be legitimately identified in a dynastic trust as having the necessary connection to the relationship.

ii) *The Relevance of a Dynastic Trust to a Relationship*

Dynastic trust assets will only ever have been relevant to a relationship in two ways: firstly through the factual use and enjoyment of the trust property and secondly through one (or both) spouse’s discretionary interest in relation to the asset. Neither of these connections will suffice to support a claim of any property interest in the assets themselves.

In the first instance this is demonstrated easily outside the trust context. A couple who live in a house owned by one of their parents have no ‘relationship property’ entitlement to the house upon separation, regardless of the factual use and enjoyment of the house as their

²⁴⁴ Property (Relationships) Act, s 1M.

family home. The only difference between this situation and a situation where the house is held in a dynastic trust is through the second instance of relevance, the existence of a discretionary interest held by one or both spouses relating to the asset. This is more fundamental to clarifying the absence of basis for establishing any relationship property rights in specific dynastic assets. A discretionary interest does not create any property right in the asset and the retention of a discretionary interest which enables one spouse to continue to benefit in fact from an asset like the family home cannot be within the scope of proprietary inequality that the P(R)A seeks to redress.

In Ms Kidd's situation her husband had no greater proprietary interest in any of the assets that were factually relevant to their relationship.²⁴⁵ It would be incredibly tenuous to afford any greater proprietary connection to an asset that is relevant to a relationship only in these limited ways and it is the proprietary connection that is necessary to justify the alteration of interests in specific assets that the P(R)A is concerned with equalising.

iii) The limited scope for reform within the P(R)A framework

The conceptual challenges to finding a 'relationship property' basis in the dynastic context becomes particularly important when considering reform options that argue for ways around the strict limitations of requiring 'beneficial ownership' to confer relationship property rights in trust assets. Any reform that is conceptually coherent with the P(R)A objectives will have a limited ability to provide any greater entitlement to dynastic trust property for a spouse like Ms Kidd. Such coherency is found where an asset being held in trust can be said to have defeated the relationship property rights of a spouse or partner or where the trust structure is undermining the objectives of the P(R)A

For example, some commentators have suggested that a power to vary trusts insofar as the assets held in trust represent relationship property could enable appropriate effect be given to the objectives of the P(R)A.²⁴⁶ Peart, Henaghan and Kelly suggest that a trust settled by a third party could be amenable to such a power insofar as the assets it holds represent relationship property. They suggested that this would be the case where the action of one

²⁴⁵ Admittedly, these arguments are not limited in application to dynastic trusts but the dynastic difference becomes important when considering the basis for reform that would give effect to relationship property rights in trust assets.

²⁴⁶ Peart, Henaghan and Kelly, above n 235.

spouse has led to an increase in value of trust property.²⁴⁷ However, this assumes that if the property wasn't held in trust it would be beneficially owned by one of the spouses, so that the efforts of spouse would have given rise to relationship property rights, despite the property being sourced from a third party.²⁴⁸ This would only be true if the property had been distributed to the beneficiary spouse by the trust, which has obviously not occurred and may never have occurred. This raises the question of how it could ever be determinable that dynastic assets could justifiably be considered 'relationship property,' but for the trust? Unless the property is in the trust as the result of spousal disposition, there is no basis for saying that if the property wasn't held in trust it would be in the beneficial ownership of either spouse.

Amending the P(R)A to include assets in which a person has a discretionary interest as 'property' or simply adopting a more 'operative'²⁴⁹ interpretation of property 'in line with the social purposes of the Act'²⁵⁰ also poses significant challenges to the qualified conception of equality that is inherent in the limited rights the P(R)A confers. No reform to the P(R)A as currently conceptualised can support the treatment of a dynastic trust asset as 'property' of the either spouse, without there being an underlying proprietary inequality to remedy. The only relevant inequality is measured in terms of the maximum interest either spouse has in the asset, which has to be considered relative to the other interested parties and is not quantifiable when all interests are discretionary. A power that would give direct access to dynastic trust assets in defiance of the limited proprietary basis for doing so cannot be rationalised as being premised on a proprietary entitlement to equality with one's spouse as the P(R)A conceives it. Such a power would effectively require a carving out of a 'relationship interest' in an asset that is neither representative of the fruits of the marriage nor beneficially owned by any party that would then, logically, be available for division between both the spouses. To create a relationship-based priority in such an asset is arbitrary. It would be in disregard of the variety of interests that exist in the asset through the trust, and could

²⁴⁷ Peart, Henaghan and Kelly, above n 235, at 881.

²⁴⁸ Property (Relationships) Act, s 9A.

²⁴⁹ Frances Gush "Relationship Property Rights and Trusts: the "Bundle of Rights Theory" (LLM Thesis, Victoria University of Wellington, 2011) , at 72, discusses the 'operative' use of property in social legislation when she was discussing the wide conception of using 'property' in the Domestic Violence Act 1995 in providing occupations orders for spouses. The clear rationale for such an operative use of property, so that it would include discretionary interests, is driven by the protection objectives of the Act. The Property (Relationships) Act is not aimed at provision or protection and its social objectives must be considered in light of what it is aimed at.

²⁵⁰ Frances Gush "The "Bundle of Rights" - Unravelling Trust Principles? (2012) 7 NZFLJ 157 at 164.

only be premised on the use and enjoyment of the asset during the relationship, which is the only other relevant connection outside the discretionary interest one or either spouse holds. This is not justifiable when considered against other interests in the property.

Including wider conceptions of the types of ‘property’ that the P(R)A applies to, in a manner that creates indirect remedies for a spouse in relation to the trust, such as if discretionary interests were recognised as ‘property’ for the purpose of the P(R)A²⁵¹ will be of little use when it comes to classifying that ‘property’ as relationship property. The source of the ‘property’ is important and any discretionary interest held by a spouse in a dynastic trust will be classified as separate property even if it could be given any value.²⁵² The same challenge of classifying the relevance of the trust as relationship property is evident to simply including a broad term like ‘financial resources’ in the P(R)A.

Essentially, any inequality that exists for a spouse in Ms Kidd’s situation is not within the concept of equality that the P(R)A seeks to remedy. This is because, when entitlement is rationalised on a basis of respective property interests connected to a relationship, the limited nature of either spouse’s interest in dynastic assets means that neither unequally benefit from any ‘property’ held by either party. More is required than a discretionary interest in a particular asset to support a relationship property right. Unlike the regimes for redistributing wealth post-relationship in England and Australia which are fundamentally underpinned by wider objectives, the P(R)A is concerned only with achieving a limited type of equality between spouses at the end of their relationship. Ms Kidd’s situation is not one the P(R)A can respond to because according to the P(R)A’s scheme, equality is determined as between relative proprietary rights of spouses that are sufficiently connected to the relationship.

The conceptual challenges for recognising relationship property rights in dynastic assets mean that the dynastic fortress against relationship property rights is incredibly strong.

²⁵¹ See Tobias Barkley “Discretionary Interests and Rights to Replace Trustees: Can they be Property?” (LLM Thesis, University of Otago, 2011).

²⁵² This is similar to the reasons offered in Chapter II for why any ‘bundle of rights’ type argument won’t create any entitlement to dynastic trust assets.

B. Re-Thinking Post-Relationship Obligations

A stronger conceptual basis for establishing the legal relevance of a dynastic trust could exist in the support received from the trust during the relationship, which directly affects the level of financial need a spouse faces upon separation. The trust becomes relevant not in a sense of generating proprietary entitlement to its assets but from the fact that it has supported a relationship significantly and the scope of consequences of relationship break down directly correlate to the level of support received during marriage.

A needs-based rationale is capable of incorporating wider connections between the trust and a relationship rather than to specific assets. However, the connection would only legitimately exist indirectly through a spousal obligation to remedy the financial need that is generated by the end of the relationship. This would preserve the integrity of the trust, as advocates for a power to consider ‘financial resources’ point out.²⁵³ There is currently a duty on spouses to meet the reasonable needs of each other in the form of maintenance²⁵⁴ based on assessment of the liable spouse’s ‘means.’ Expansion of maintenance powers to include an assessment of a spouse’s ‘financial resources’ could enable the trust to be relevant in the orders that would be determined against the spouse, in a similar way to how England approaches trusts.²⁵⁵

In the absence of a needs-based obligation owed by a spouse that is quantified with a realistic and broad assessment of wealth, through a test like ‘likely financial resources,’ there is no basis to justify considering the role of the trust in relationship break down. Wider social equality could make such an obligation desirable to impose. If spouses are not responsible for bridging the economic gap that reflects disparate financial needs caused by separation then it is an inevitable state burden.

²⁵³ See Gush, above n 250.

²⁵⁴ Family Proceedings Act 1980, s 64.

²⁵⁵ See Chapter III. In the Child Support Act 1991, s 150 provides for a liable parent’s ‘financial resources’ to be taken into account. This recognises a holistic assessment of wealth where a person owes a duty of support that could be used as a guideline for re-thinking spousal support obligations.

Conclusion

This paper set out to test the fortress of dynastic trusts against relationship property rights in New Zealand. It is clear that dynastic trusts afford significant protection from spousal claims against trust assets. Although accessing discretionary trust assets is a general difficulty for relationship property law, the dynastic difference creates a unique conceptual challenge for relationship property rights as currently conceived in the P(R)A. Following analysis of the limited ways that a relationship-based claim to dynastic assets could succeed outside of having relationship property rights per se in a particular asset the battle to prove entitlement is a long road for spouses like Ms Kidd.

The strongest argument for reforming this outcome and to enable the trust to be relevant in a post relationship context is to establish its relevance on a support basis, in obligation owed by a spouse to meet the needs of because Trying to establish a sufficient proprietary connection to justify spousal entitlements is inherently at odds with the lack of proprietary interests either spouse has in dynastic trust assets. The limitations of the concept of ‘relationship property rights’ in New Zealand enable dynastic trusts to keep a strong protection over family property. Without extensive conceptual and system wide reform to how we deal with post relationships entitlements in New Zealand, this generation’s family homes are likely to be the next generation’s castles, immune from spousal claims while held in dynastic trust.

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